SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 828

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, ET AL., PETITIONERS,

vs.

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

At Law. No. 1134

W. B. GILMER, Receiver for the First National Bank of Louisa, Louisa, Virginia, Plaintiff,

vs.

C. L. PERKINS, W. R. DUNKUM, W. WORTH SMITH, JR., P. B. Porter, J. P. Donnally, in Hiw Own Right and as Trustee, Thomas S. Winston, W. Earl Crank, Waller Holladay, J. F. Bickers, Administrator of U. M. Gentry, Hunter Pendleton Porter, Administrator of H. W. Porter, Deceased, and L. P. Chisholm, Defendants

NOTICE OF MOTION FOR JUDGMENT—Filed May 12, 1934.

You are hereby notified that on May 28th, 1934, I shall move the United States District Court for the Eastern District of Virginia, for a judgment against you for the sum of $22,000.00, with interest from January 22, 1934, the same being due to me from you by reason of the following facts:

[fol. 2] The First National Bank of Louisa, Louisa, Virginia, is a banking corporation organized under the banking laws of the United States and the stockholders therein are subject to assessment as provided by the laws of the United States. The First National Bank of Louisa, Louisa, Virginia, has been declared insolvent by the Comptroller of Currency of the United States, and W. B. Gilmer has been appointed Receiver and ordered to file this suit. There has been an assessment of the par value of $100.00 a share duly made by the Comptroller of Currency December 14, 1933. This assessment carries interest from January 22, 1934.

In September, 1930, J. P. Donnally, C. L. Perkins, W. R. Dunkum, W. Worth Smith, Jr., P. B. Porter, Thomas S. Winston, W. Earl Crank, Waller Holladay, U. M. Gentry, L. P. Chisholm and H. W. Porter bought from the First National Bank of Louisa, two hundred and thirty (230) shares of its capital stock of the par value of $100.00 per share after having formed a special combination of them-

selves for the specific purpose of buying said stock for profit, said purchasers were directors in the First National Bank of Louisa, and they had determined that it was for the interest of the Bank, and of course their interest as stockholders and directors, to increase the capital stock by two hundred and fifty (250) shares. They arranged sale of twenty (20) shares of stock and took title to the remaining two hundred and thirty (230) shares in the name of J. P. Donnally, Trustee for L. P. Chisholm and others, so that the stock could be more conveniently handled and shares more conveniently sold. They paid for this stock with the proceeds of a joint and several note discounted in the American Bank and Trust Company of Richmond, Virginia. In August, 1931, ten shares of this stock were sold to R. S. McDonald and the proceeds credited on their joint debt. All dividends from this stock were credited to the account of J. P. Donnally, Trustee for L. P. Chisholm et als. The said owners of the stock were joint adventurers in the purchase and handling of said stock and were joint owners thereof and jointly and severally liable for the assessment made thereon.

W. B. Gilmer, Receiver, is a citizen of the State of Virginia, residing at Louisa, Virginia, in the Eastern District of Virginia. He has been duly appointed Receiver of said [fol. 3] Bank and as such authorized to sue in United States Courts.

W. B. Gilmer, Receiver of the First National Bank of Louisa, Louisa, Virginia, By Counsel. (Sgd.) George Gilmer, p. q.

MARSHAL'S RETURNS.

I hereby certify that on the 7th day of May, 1934, I delivered a true copy of the within Notice of Motion to P. B. Porter, J. P. Donnally in his own right and as trustee, W. Earle Crank and J. F. Bickers, Administrator of U. M. Gentry, all in person, in the town of Louisa, Virginia, a place within my District.

I further certify that on the 7th day of May, 1934, I delivered a true copy of the within Notice of Motion to W. R. Dunkum, in person, at Green Springs, Louisa County, Va., a place within my District.

I further certify that on the 7th day of May, 1934, I delivered a true copy of the within Notice of Motion to C. L. Perkins, in person, at Bell's Cross Roads, Louisa County, Virginia, a place within my District.

Not finding the defendant L. P. Chisholm named within, at his usual place of abode in the County of Louisa, Virginia, or any person upon whom service could be made, I posted a true copy of the within Notice of Motion on the front door of his place of abode in the County of Louisa, Virginia, a place within my District.

I further certify that on the 8th day of May, 1934, I delivered a true copy of the within Notice of Motion to W. Worth Smith, Jr., and Waller Holladay, in person, in the City of Richmond, Virginia, a place within my District.

R. L. Ailworth, United States Marshal, by (sgd.) Thomas N. Saunders, Deputy U. S. Marshal.

I further certify that on the 12th day of May, 1934, I delivered a true copy of the within Notice of Motion to Hunter Pendleton Porter, Administrator of H. W. Porter, [fol. 4] deceased, in person, in the Town of Louisa, Virginia, a place within my District.

R. L. Ailworth, United States Marshal, by (sgd.) Thomas N. Saunders, Deputy Marshal.

I further certify that on the 7th day of May, 1934, I delivered a true copy of the within Notice of Motion to Thomas S. Winston, in person in the County of Louisa, Virginia, a place within my District.

This return is made this 28th day of May, 1934, by order of the District Court of the United States for the Eastern District of Virginia.

R. L. Ailworth, United States Marshal, by (sgd.) Thomas N. Saunders, Deputy U. S. Marshal.

IN UNITED STATES DISTRICT COURT

GROUNDS OF DEFENSE—Filed May 26, 1934

Comes now the defendant, J. F. Bickers, Sheriff, and as such, administrator of the estate of U. M. Gentry, deceased, and for his grounds of defense to the notice of motion exhibited to him, says:

1. That he knows not the circumstances incident to the alleged purchase of 230 shares of the capital stock of the First National Bank of Louisa and calls for strict proof as to the execution of such a contract;

2. That the owners of the stock were not joint adventurers or joint owners to such an extent that they were jointly and severally liable for the assessment made thereon, but that insofar as this defendant's decedent is concerned, the most that can even be claimed is a several liability of $2,000.00;

3. That this defendant's decedent, at the time of the [fol. 5] alleged contract of September, 1930, set out in the plaintiff's notice of motion and upon which this action is based, was mentally incompetent to execute or enter into such an agreement and had been so incompetent a long time prior to said alleged contract and was so incompetent until the time of his death;

4. That no recovery has been had against this defendant on the joint and several note discounted in the American Bank and Trust Company of Richmond, Virginia, the proceeds of which it is claimed were used to purchase the stock in question.

J. F. Bickers, Sheriff, and as such, administrator of the estate of U. M. Gentry, Deceased, by (sgd.) Sinnott & May, Counsel.

IN UNITED STATES DISTRICT COURT

PLEA IN ABATEMENT—Filed May 28, 1934

The said defendant, L. P. Chisholm, in his own proper person, specially appearing for this purpose and none other, comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him, and the said defendant says that the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

Wherefore, the said defendant prays that this case be dismissed and that he go hence without day.

(Sgd.) L. P. Chisholm. (Sgd.) M. J. Fulton. (Sgd.) W. W. Walsh.

[fol. 6] *Duly sworn to by L. P. Chisholm. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

PLEA IN ABATEMENT—Filed May 28, 1934

The said defendant, W. Earle Crank, in his own proper person, specially appearing for this purpose and none other, comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him, and the said defendant says that the so-called notice of motion filed in this cause is void and of no effect, and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

Wherefore, the said defendant prays that this case be dismissed and that he go hence without day.

[fol. 7] *Duly sworn to by W. Earle Crank. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

PLEA IN ABATEMENT—Filed May 28, 1934

The said defendant, W. R. Dunkum, in his own proper person, specially appearing for this purpose and none other, comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him, and the said defendant says that the so-called notice of motion filed in this cause is void and of

no effect, and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

Wherefore, the said defendant prays that this case be dismissed and that he go hence without day.

Duly sworn to by W. R. Dunkum. Jurat omitted in printing.

[fol. 8] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 28, 1934

And the said defendant, Waller Holladay, appearing specially for the purpose of this motion and objecting to the jurisdiction of this Court and for no other purpose, by his attorneys, moves to dismiss the above entitled proceedings because, he says, the notice of motion and return thereon is void and of no effect and that no process requiring him to answer the plaintiff's claim, if any the plaintiff have, has been issued or executed upon him, and because the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this Court by notice of motion for a judgment as the plaintiff has attempted to do in this case.

(Sgd.) M. J. Fulton, (Sgd.) H. W. Walsh, Attorneys, Who Appear for Purposes of this Motion and None Other.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 28, 1934

And the said defendant, W. R. Dunkum, appearing specially for the purpose of this motion and objecting to the jurisdiction of this Court and for no other purpose, by his attorney, moves to dismiss the above entitled proceedings because, he says, the notice of motion and return thereon is void and of no effect and that no process requiring him to answer the plaintiff's claim, if any the plaintiff have, has been issued or executed upon him, and because the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this

Court by notice of motion for a judgment as the plaintiff [fol. 9] has attempted to do in this case.

(Sgd.) W. Earle Crank, Attorney Who Appears for Purposes of this Motion and None Other.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 28, 1934

And the said defendant, L. P. Chisholm, appearing specially for the purpose of this motion and objecting to the jurisdiction of this Court and for no other purpose, by his attorneys moves to dismiss the above entitled proceedings because, he says, the notice of motion and return thereon is void and of no effect and that no process requiring him to answer the plaintiff's claim, if any the plaintiff have, has been issued or executed upon him, and because the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this Court by notice of motion for a judgment as the plaintiff has attempted to do in this case.

(Sgd.) M. J. Fulton, (Sgd.) H. W. Walsh, Attorneys, Who Appear for Purposes of this Motion and None Other.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS FOR DEFECTIVE SERVICE—Filed May 28, 1934

The defendant, L. P. Chisholm by his attorneys appears herein specially for the sole purpose of making this motion to question the jurisdiction of the Court over his person, and for said purpose only moves the Court to set aside and [fol. 10] quash the alleged service of notice of motion for judgment upon the said defendant.

(Sgd.) H. W. Walsh, 240 Court Square, Charlottesville, Va., and (Sgd.) M. J. Fulton, 1108 Mutual Building, Richmond, Va., Attorneys for Said Defendant Appearing Specially and Solely for the Purpose Aforesaid.

IN UNITED STATES DISTRICT COURT

PLEA IN ABATEMENT—Filed June 1, 1934

The said defendant, Waller Holladay, in his own proper person comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him and the said defendant says that the so-called notice of motion filed in this cause is void and of no effect, and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

Wherefore the said defendant prays that this case be dismissed and that he go hence without day.

(Sgd.) Waller Holladay.

Duly sworn to. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER TO MOTION TO DISMISS—Filed September 25, 1934

The plaintiff answers the motion of the defendants to dismiss this proceeding and says that the notice of motion and return thereon is valid and of full force and effect and that no other process or notice is required and the action can be maintained in this Court by notice of motion for judgment as as the plaintiff has filed.

W. B. Gilmer, Receiver of the First National Bank of Louisa, Louisa, Virginia, by Counsel. (Sgd.) George Gilmer.

IN UNITED STATES DISTRICT COURT

DEMURRER TO PLEAS IN ABATEMENT—Filed September 25, 1934

The plaintiff demurs to the pleas in abatement filed by the defendants in this action and says that the same are not sufficient in law because the only ground alleged in the

plea of abatement for the abatement of the action is that no writ has been issued from this Court, whereas in this proceeding no writ is required to be issued from this Court.

W. B. Gilmer, Receiver of the First National Bank of Louisa, Louisa, Virginia, by Counsel. (Sgd.) George Gilmer.

[fol. 12] IN UNITED STATES DISTRICT COURT

REPLICATION—Filed September 25, 1934

The said plaintiff by his said attorney comes and says that notwithstanding anything by these defendants said in their plea in abatement alleged this Court ought not to be precluded from taking further cognizance of this action because these defendants have been duly summoned as required by law by a notice of motion for judgment and that in such proceeding it is not necessary that a writ issue from this Court and that the defendant is ready to verify wherefore he prays judgment that his claim aforesaid together with interest and costs may be found due him and judgment rendered.

W. B. Gilmer, Receiver of the First National Bank of Louisa, Louisa, Virginia, by Counsel. (Sgd.) George Gilmer.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS, ETC.—Entered and Filed October 10, 1934

This day came the plaintiff, by counsel, and L. P. Chisholm, Waller Holladay and W. Earl Crank, by counsel, and after due argument and full consideration, the Court [fol. 13] overrules the motion of the defendants to dismiss this proceeding and sustains the plaintiff's demurrer to these defendants' plea in abatement to which action of the Court these defendants excepted.

And these defendants having stated that they wished to file a demurrer it is ordered that the demurrer be filed with-

in 10 days of this date and a copy given to counsel for plaintiff. It is further ordered that the hearing of this demurrer be set for December 13th, the defendants not waiving their said plea and motion.

(Sgd.) Luther B. Way, United States District Judge.

October 10, 1934.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING DEMURRER—Entered and Filed October 25, 1934

This day came the defendants, Waller Halladay, L. P. Chisholm, W. Earl Crank, offered jointly and severally demur in writing and the same is accordingly filed.

(Sgd.) Luther B. Way, United States District Judge.

October 25, 1934.

IN UNITED STATES DISTRICT COURT

DEMURRER TO NOTICE OF MOTION FOR JUDGMENT—Filed October 25, 1934

The defendants, Waller Halladay, L. P. Chisholm, W. E. Crank, jointly and severally demur to the notice of motion [fol. 14] for judgment filed in this case and for grounds of demurrer says:

1. That the same is not sufficient in law;

2. That the notice fails to allege when the alleged assessment was made and that this defendant or any of the other defendants were stockholders at the time of the assessment alleged, or at the time the first note band of Louis was declared insolvent;

3. That the notice fails to allege by what authority the comptroller has undertaken to make the assessment alleged or under what statute of the United States, if any, he was acting in making the alleged assessment;

4. That the notice fails to allege notice to this defendant of said alleged assessment, or demand for payment of the same;

5. That the notice is so vague and uncertain that it does not appear what interest, if any, these several defendants had in said 230 shares or the terms of subscription or contract or ownership upon which liability of these defendants respectively is sought to be based or predicated and held liable for the alleged assessment.

(Sgd.) H. W. Walsh, (Sgd.) M. J. Fulton, Counsel for Demurrants.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING DEMURRER AND SUPPLEMENTAL DEMURRER—Entered and Filed December 13, 1934

This day came the plaintiff and the defendants, L. D. Chisholm, W. E. Crank, and Waller Holladay, and argued the original demurrer filed by these defendants and supplemental demurrer filed this day by leave of Court.

[fol. 15] Upon consideration of which the Court overrules the original demurrer and supplemental demurrer, except the Court sustains the original demurrer for the failure of the plaintiff to allege that the defendants owned the stock sued on at the time of the insolvency or the assessment. Thereupon the plaintiff moved the Court at the bar thereof to be allowed to amend his notice in this case by writing in the margin "said joint adventurers never jointly nor severally disposed of or attempted to dispose of said 220 shares nor any part thereof nor any interest therein, and the same 220 shares were owned by the defendants jointly from the purchase thereof to December 14, 1933". Thereupon the Court granted leave to the plaintiff to amend his notice by writing in the margin thereof said language, which the plaintiff accordingly did at the bar of the Court.

Thereupon said three defendants filed their said original and supplemental demurrer to the notice so amended on the grounds set out in said original demurrer heretofore filed in writing in this case. Thereupon the Court over-

ruled the demurrer to the amended notice and to which action and ruling of the Court the said defendants except.

And on motion of the plaintiff, it is ordered that defendants do file their grounds of defense within thirty days from this date.

And this case is continued and set for trial on April 22, 1935.

(Sgd.) Luther B. Way, United States District Judge.

December 13, 1934.

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE FROM GROUNDS OF DEFENSE OF J. F. BICKERS, ADMINISTRATOR, ETC.—Filed December 17, 1934

To John G. May, Jr., Attorney for J. E. Bickers, Sheriff and as such Administrator of the Estate of U. M. Gentry:

You are hereby notified that on January 29, 1935, I shall move the United States District Court for the Eastern Dis-[fol. 16] trict of Virginia to strike from your grounds of defense, the third ground because the insanity of U. M. Gentry constitutes no defense to an assessment on the stock, the persons exempt from stock being limited to executors, administrators, guardians, trustees, insane people being not among those exempt from liability and also on the authority of Thomas vs. Continental Trust Company of Pittsburgh, 2 Fed. Supp. 654, and Christopher vs. Norvell, 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. cases 740, and other authorities.

At the same time I shall move to strike out the fourth ground on the ground that it is no defense at all, even a release would not constitute a defense. I shall not limit myself to the authorities listed above.

W. B. Gilmer, Receiver for the First National Bank of Louisa, Louisa, Virginia, by Counsel. (Sgd.) George Gilmer, p. q.

Legal and timely service acknowledged.

(Sgd.) John G. May, Jr., Attorney As Set Out Above.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO STRIKE DEFENDANT'S THIRD GROUND OF DEFENSE—Entered and Filed April 1, 1935

[fol. 17] This day came the plaintiff by counsel, and the defendant J. F. Bickers, Administrator of U. M. Gentry, by counsel, and the court having heard the argument of counsel and having maturely considered the matter, overrules the motion of the plaintiff to strike said defendant's third ground of defense, which is as follows:

"That this defendant's decedent, at the time of the alleged contract of September, 1930, set out in the plaintiff's notice of motion and upon which this action is based, was mentally incompetent to execute or enter into such an agreement and had been so incompetent a long time prior to said alleged contract and was so incompetent until the time of his death."

to which action of the court in overruling his motion, the plaintiff by counsel excepted.

(Sgd.) Luther B. Way, United States District Judge.

April 1, 1935.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING GROUNDS OF DEFENSE—Entered and filed April 18, 1935

This day came defendants, Waller Holladay, L. P. Chisholm, and W. Earle Crank and moved for leave to file their respective separate grounds of defense, which, being granted the same are accordingly filed, but subject to any proper objections by plaintiff to same being considered at this time.

(Sgd.) Luther B. Way, United States District Judge

April 18, 1935.

[fol. 18] IN UNITED STATES DISTRICT COURT

GROUNDS OF DEFENSE—Filed April 18, 1935.

Defendant, L. P. Chisholm, for grounds of defense says,

1. That he is not liable as alleged in said notice of motion;

2. That he did not with several others named in the notice of motion in this case buy from the First National Bank of Louisa two hundred and thirty shares of the capital stock of said bank of the par value of $100.00 per share, as alleged in said notice of motion;

3. That no contract of subscription or for purchase for two hundred and thirty shares of capital stock of said bank was entered into by him, either individually or jointly with others;

4. That he did not with others named in said notice of motion form a special combination between themselves for the specific purpose of buying said shares of stock for profit as alleged in said notice of motion;

5. That he accepted and paid for one-eleventh part of said two hundred and thirty shares mentioned in said notice of motion, and his interest in stock of said bank in respect to said two hundred and thirty shares was to that extent only.

6. That he was not a joint adventurer with others named in said notice of motion in the purchase or handling of said two hundred and thirty shares, nor was he a joint owner with such others of said shares;

7. That no assessment could be or has been lawfully made in respect to said two hundred and twenty shares as alleged in said notice of motion;

8. That he denies all material allegations of said notice of motion and reserves the right to rely upon the failure [fol. 19] of the plaintiff to prove any material allegation of said notice of motion.

(Sgd.) L. P. Chisholm, by Allen, Walsh and Waddell, Fulton and Hall, His Counsel.

IN UNITED STATES DISTRICT COURT

GROUNDS OF DEFENSE—Filed April 18, 1935

Defendant, W. Earl Crank, for grounds of defense says,

1. That he is not liable as alleged in said notice of motion;

2. That he did not with several others named in the notice of motion in this case buy from the First National Bank of Louisa two hundred and thirty shares of the capital stock of said bank of the par value of $100.00 per share as alleged in said notice of motion;

3. That no contract of subscription or for purchase for two hundred and thirty shares of capital stock of said bank was entered into by him, either individually or jointly with others;

4. That he did not with others named in said notice of motion form a special combination between themselves for the specific purpose of buying said shares of stock for profit as alleged in said notice of motion;

5. That he accepted and paid for one-eleventh part of said two hundred and thirty shares mentioned in said notice of motion and his interest in stock of said bank in respect to said two hundred and thirty shares was to that extent only.

6. That he was not a joint adventurer with others named in said notice of motion in the purchase or handling of said [fol. 20] two hundred and thirty shares, nor was he a joint owner with such others of said shares;

7. That no assessment could be or has has been lawfully made in respect to said two hundred and twenty shares as alleged in said notice of motion;

8. That he denies all material allegations of said notice of motion and reserves the right to rely upon the failure of the plaintiff to prove any material allegation of said notice of motion.

(Sgd.) W. Earl Crank, by Allen, Walsh and Waddell, Fulton and Hall, His Counsel.

IN UNITED STATES DISTRICT COURT

GROUNDS OF DEFENSE—Filed April 18, 1935

Defendant, Waller Holladay, for grounds of defense says,

1. That he is not liable as alleged in said notice of motion;

2. That he did not with several others named in the notice of motion in this case buy from the First National Bank of Louisa two hundred and thirty shares of the capital stock of said bank of the par value of $100.00 per share, as alleged in said notice of motion.

3. That no contract of subscription or for purchase for two hundred and thirty shares of capital stock of said bank was entered into by him, either individually or jointly with others;

4. That he did not with others named in said notice of motion form a special combination between themselves for the specific purpose of buying said shares of stock for profit as alleged in said notice of motion;

[fol. 21] 5. That he accepted and paid for one-eleventh part of said two hundred and thirty shares mentioned in said notice of motion, and his interest in stock of said bank in respect to said two hundred and thirty shares was to that extent only.

6. That he was not a joint adventurer with others named in said notice of motion in the purchase or handling of said two hundred and thirty shares, nor was he a joint owner with such others of said shares;

7. That no assessment could be or has been lawfully made in respect to said two hundred and twenty shares as alleged in said notice of motion;

8. That he denies all material allegations of said notice of motion and reserves the right to rely upon the failure of the plaintiff to prove any material allegation of said notice of motion.

(Sgd.) Waller Holladay, by Allen, Walsh and Waddell, Fulton and Hall, His Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING PLEA OF BANKRUPTCY AND OF THE GENERAL ISSUE—Entered and Filed April 22, 1935

This day came the defendant, C. L. Perkins, and presented his plea of bankruptcy and the general issue and, on motion, the same is hereby Ordered filed.

(Sgd.) Luther B. Way, United States District Judge.

April 22, 1935.

[fol. 22] IN UNITED STATES DISTRICT COURT

PLEA OF BANKRUPTCY AND OF THE GENERAL ISSUE—Filed April 22, 1935

The defendant, C. L. Perkins, by his attorney, comes and says that he does owe Twenty-two Thousand ($22,000.00) Dollars as claimed in the notice of motion, and denies that he with others purchased two hundred thirty (230) shares of stock, as stated in said notice of motion. On the 1st day of May, 1934, that he was adjudicated a bankrupt in the United States District Court for the Eastern District of Virginia and that the said plaintiff's alleged claim was duly scheduled in his petition, that he has applied for, but not yet obtained, his discharge in bankruptcy and that he now pleads said bankruptcy as a bar to the claim made by the plaintiff in plaintiff's notice of motion.

(Sgd.) C. L. Perkins, by Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO SET ASIDE THE VERDICT, ETC. —Entered and filed April 25, 1935

On the 23rd day of April, 1935, came again the parties by their attorneys and the jury appeared pursuant to ad-

journment. Whereupon the evidence having been fully heard, and each party by counsel having moved the court to direct a verdict in his favor, the court for the reasons stated in its memorandum of opinion from the bench, overruled the motion of defendants to direct a verdict in their favor and directed the jury to return a verdict in favor of the plaintiff. Whereupon the plaintiff by his attorneys moved the Court to omit the name of the defendant, J. F. [fol. 23] Bickers, Administrator of U. M. Gentry, deceased, on the ground that the case has been continued as to him by reason of his having filed a plea of insanity on the part of U. M. Gentry at the time that the transaction involved in this case took place, and to omit the names of W. Worth Smith, Jr., P. B. Porter, J. P. Donnally, and Hunter Pendleton Porter, Administrator of H. W. Porter, deceased, on the ground that each of them has filed a plea of bankruptcy, which motion the court doth sustain. Thereupon, the jury returned the following verdict:

"We, the jury, at the direction of the Court, find in favor of the plaintiff against the defendants W. R. Dunkum, Thomas S. Winston, W. Earl Crank, Waller Holladay, and L. P. Chisholm, in the amount of $22,000.00 (Twenty-two thousand dollars) together with interest from January 22nd, until paid.

(Sgd.) Charles L. Weaver, Foreman."

April 23, 1935.

And it appearing to the court that W. Worth Smith, Jr., has secured a discharge in bankruptcy and that this claim is dischargeable in bankruptcy and that the plaintiff's claim was scheduled in the bankruptcy proceeding, it is ordered that this action be dismissed as to him, and it further appearing that P. B. Porter, J. P. Donnally, C. L. Perkins and Hunter Pendleton Porter, Administrator of H. W. Porter have filed pleas of bankruptcy but that they have not yet been granted their discharge, this action is continued as to them until their discharge is granted or the time for securing it has passed.

Whereupon the defendants by their attorneys moved the court to set aside the verdict of the jury and enter judgment for defendants or grant them a new trial on the ground that the verdict is contrary to the law and the evidence and that the jury should have been instructed to

find for the defendants and because evidence had been improperly admitted and evidence had been improperly excluded which motion the court doth continue for argument until a later day in the term. The defendants duly excepted to the action of the Court in refusing to grant their [fol. 24] motion for a directed verdict and in granting a directed verdict in favor of plaintiff.

(Sgd.) Luther B. Way, United States District Judge.

April 25, 1935.

IN UNITED STATES DISTRICT COURT

MOTION TO SET ASIDE DIRECTED VERDICT—Filed May 31, 1935

Defendants, L. P. Chisholm, Waller Holladay and W. E. Crank move to set aside the directed verdict and award a new trial and for grounds of said motion say:

(1) That no trial should have been had when the case was not set as to U. M. Gentry's administrator and he was not bound by the judgment which might be entered upon the trial;

(2) That the Court improperly admitted evidence as noted in the transcript.

(3) That the Court improperly excluded evidence offered by defendants as noted in the Transcript;

(4) That the Court directed a verdict for the plaintiff when the evidence and the inferences therefrom taken most favorable to the defendants, could have justified the jury in finding a verdict for the defendants;

(5) That the evidence and the inferences to be drawn therefrom were not so clear and direct that the jury might not as reasonable men have found a verdict for the defendants;

(6) That the case, if there was sufficient evidence to sustain a verdict for the plaintiff, should have been submitted to the jury to resolve conflicts and draw inferences from the evidence;

(7) That the Court in directing a verdict for the plaintiff drew inferences, and was obliged to draw inferences,

[fol. 25] directly contrary to the evidence which the jury might properly have accepted and which inferences the jury might properly not have drawn;

(8) That there was no evidence of such circumstances as would involve liability on these defendants for assessment to a greater amount than in respect to one-eleventh part of the 220 shares registered in the name of J. P. Donnally, Trustee; the evidence showed that each of these defendants merely owned one-eleventh, and in no way assumed liability in respect to portions owned by others than themselves respectively;

(9) The Court in directing a verdict for the plaintiff erred for it thereby in effect struck out or disregarded the evidence offered for the defendants as to their contract to purchase of only one-eleventh interest in the 220 mentioned in the notice of motion and disregarded the actual construction placed and acted upon by the defendants on their said contract of purchase; and the Court in effect made a contract of purchase for the defendants in lieu and contrary of that made by them and erroneously substituted the Court's judgment in lieu of the construction placed by the defendants upon their contract of purchase and acted upon by them. This Court may not do so.

(Sgd.) M. J. Fulton, (sgd.) Walsh & Waddell, Attys. for above named defendants.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO SET ASIDE VERDICT—Entered and Filed July 2, 1935

This day came again the parties by their attorneys, and the attorneys for the defendants renewed their motion to set aside the verdict of the jury rendered by direction of the court in favor of the plaintiff on the 23rd day of April, 1935, on the ground that the verdict is contrary to the [fol. 26] law and the evidence, and for reasons stated in a written memorandum presented to court.

And the court, having maturely considered the motion aforesaid and the argument of counsel, doth overrule the same.

Whereupon, it is ordered that the plaintiff do recover judgment against W. R. Dunkum, T. S. Winston, W. Earl Crank, Waller Holladay and L. P. Chisholm and each of them in the sum of $22,000.00, with interest thereon from January 22, 1934, until paid, to which action of the court the defendants, by counsel, except.

(Sgd.) Luther B. Way, United States District Judge.

July 2nd, 1935.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR

And the said L. P. Chisholm, Waller Holladay, W. Earl Crank, T. S. Winston and W. R. Dunkum, defendants, assign the following errors in the record and proceedings in said cause,

The District Court of the United States erred in:

(1) Sustaining plaintiff's demurrer to defendant's plea in abatement and in overruling the motion to dismiss for lack of jurisdiction.

(2) Overruling the demurrer to the notice of motion for judgment.

(3) Proceeding to trial without the presence of the administrator of U. M. Gentry, one of the defendants originally named in the notice of motion and when the case was not set for trial as to said administrator; the action was begun by notice of motion against all the defendants jointly, and this procedure was without authority of law so to proceed; and in overruling the objection thereto and [fol. 27] the motion of defendants for a continuance so that all defendants should be bound by any trial and by any judgment as might be entered herein;

(4) Admitting evidence in respect to the execution by the ten personal defendants and U. M. Gentry of a note dated September 8, 1930, signed by these eleven as joint

makers, for $36,450.00, cotemporaneously reduced to $36,000.00, and discount of same at American Bank and Trust Company of Richmond, Virginia, and the pledge of 230 shares of capital stock of First National Bank of Louisa, Louisa, Virginia, as collateral, and the application of the proceeds from said note in payment of the purchase or subscription price for said stock; and in particular the admission of the evidence of L. P. Chisholm.

"that he signed a note"

and the admission in evidence of a copy of the note in question; and the admission of the evidence of C. L. Perkins,

"that in 1930 he, along with Mr. Chisholm and others, signed this big note for $36,450."

(5) Admitting evidence of —. P. Chisholm that he had brought suit against the other ten makers of the note in question in the Circuit Court of Louisa County.

(6) Admitting evidence of J. P. Donnally

"that there were two rival banks in Louisa."

(7) Admitting evidence of J. P. Donnally

"that his bank had been paying 4% on savings; that they had been trying to reduce it to 3%."

(8) Admitting evidence of J. P. Donnally as follows:

"Q. If it (price per share) had gone to $200 and you had sold some of it at $200 a share, how was the profit to be divided?

"A. I assume it would be divided out among the eleven holders of it."

[fol. 28] (9) Admitting evidence of W. B. Gilmer in respect to the amount which each of the ten original defendants and U. M. Gentry appeared from the records of the bank to have on deposit on September 6th, 1930, and the amount of the direct and indirect liability of each to the bank on that date;

(10) Overruling the defendants' motion at the conclusion of the plaintiff's evidence to direct a verdict for the defendants on the claim of joint liability for the entire assessment.

(11) Overruling the defendants' motion at the conclusion of defendants' evidence and after the plaintiff had rested to direct a verdict for defendants in respect to the liability for the entire assessment and as against each for one-eleventh part only.

(12) Sustaining the plaintiff's motion to direct a verdict for the plaintiff and in not submitting the case to the jury under proper instructions in respect to liability, if there was evidence to sustain a liability against each for the entire assessment.

(13) Overruling defendants' motion to set aside the verdict and award a new trial.

For which errors the defendants against whom judgment has been entered as aforesaid pray that the judgment of the United States District Court for the Eastern District of Virginia, entered the — day of June, 1935, in the above entitled cause be reversed, and the cause remanded with directions to award a new trial, and for such other and further relief as may be proper in the premises.

H. W. Walsh and M. J. Fulton, Counsel for Applicants.

IN UNITED STATES DISTRICT COURT

BILL OF EXCEPTIONS No. 1—Filed July 2, 1935

Be it remembered that on the 25th day of May, 1934, the defendants L. P. Chisholm, Waller Holladay and W. [fol. 29] Earl Crank filed a motion to dismiss this proceeding in writing as follows:

And the said defendant (L. P. Chisholm, Waller Holladay, W. Earl Crank) appearing specially for the purpose of this motion and objecting to the jurisdiction of this Court and for no other purpose, by his attorneys, moves to dismiss the above entitled proceedings because, he says, the notice of motion and return thereon is void and of no effect and that no process requiring him to answer the plaintiff's claim, if any the plaintiff have, has been issued or executed upon him, and because the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this Court by

notice of motion for a judgment as the plaintiff has attempted to do in this case.

And the plaintiff filed an answer thereto in writing which is as follows:

The Plaintiff answers to motion of the defendant to dismiss this proceeding and says that the notice of motion and return is valid and of full force and effect and that no other process or notice is required and the action can be maintained in this Court by notice of motion for judgment as the plaintiff has filed.

And also on the 25th day of May, 1934, the defendant, L. P. Chisholm, Waller Holladay and W. Earl Crank filed a special plea in abatement under oath as follows:

The said defendant (Walker Holladay,, L. P. Chisholm, W. Earl Crank) in his own proper person, specially appearing for this purpose and none other, comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him, and the said defendant says that the so-called notice of motion filed in this cause is void and of no effect, and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

[fol. 30] Wherefore the said defendant prays that this case be dismissed and that he go hence without day.

And the plaintiff filed a demurrer to said plea in abatement which is as follows:

The plaintiff demurs to the pleas in abatement filed by the defendant in this action and says that the same are not sufficient in law because the only ground alleged in the plea of abatement for the abatement of the action is that no writ has been issued from this Court, whereas in this proceeding no writ is required to be issued from this Court.

And the plaintiff filed his replication to said plea in abatement as follows:

The said plaintiff by his said attorney comes and says notwithstanding anything by these defendants said in their plea in abatement alleged, this Court ought not to be precluded from taking further cognizance of this action because these defendants have been duly summoned as re-

quired by law by a notice of motion for judgment, and that in such proceeding it is not necessary that a writ issue from this court and that the defendant is ready to verify, wherefore he prays judgment that his claim aforesaid, together with interest and costs, may be found due him and judgment rendered.

And thereupon the Court sustained said demurrer to said plea in abat-ment, to which action of the Court the plaintiff excepted.

And upon motion of defendant, L. P. Chisholm, Waller Holladay and W. Earl Crank, this bill of exceptions is signed and sealed this 2nd day of July, 1935.

(Sgd.) Luther B. Way, United States District Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER REQUIRING PARTIES TO REDUCE EVIDENCE TO NARRATIVE FORM—Entered and filed July 2, 1935

The defendants, C. L. Perkins and others, having through their counsel, presented to the Court their Bill of Exceptions No. 2, approved by counsel for the plaintiff, to be signed and made a part of the record, and the Court being of the opinion that the said Bill of Exceptions, as presented, fails to comply with the rules of the Circuit Court of Appeals for this Circuit, requiring testimony to be reduced to narrative form, declined to sign said Bill of Exceptions as presented, and thereupon, it is

Ordered by the Court that the parties cause the testimony embodied therein to be reduced to narrative form as required by the rules of the Circuit Court of Appeals for the Fourth Circuit, and it is

Further ordered that the time within which defendants may tender said Bill of Exceptions to the Court to be signed and made a part of the record, be and the same is extended to and including August 10th, 1935.

(Sgd.) Luther B. Way, United States District Judge.

July 2nd, 1935.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions No. 2—Filed September 9, 1935

Be it remembered that upon the calling of this case for trial on April 22nd, 1935, it was suggested that the defendant, U. M. Gentry's Administrator, was not present and that the case had been continued as to him. Thereupon counsel for L. P. Chisholm and others insisted that the [fol. 32] action was a joint action and that unless all of the defendants were present and tried together and bound by any judgment, no trial could be had, and accordingly asked that the case be continued. The Court held that the case should proceed as to the ten who were present and otherwise ready for trial without respect to the liability of U. M. Gentry's Estate, who had interposed a special plea of insanity separate and distinct from the pleas interposed by any of the others, to which ruling of the Court the defendants, L. P. Chisholm, W. E. Crank and Waller Holladay, excepted on the ground that this being a joint action the case could not proceed unless all the defendants were present and tried together.

And counsel for plaintiff asked that counsel for U. M. Gentry's Administrator state his position, and the latter stated that he had no definite authority to make any agreement but that whether the liability is $25,000.00 or $2,500.00, so far as advised, that question is not material, as to his client.

Thereupon, to maintain the issue on the part of the plaintiff, he introduced the following testimony:

L. P. CHISHOLM, one of the defendants called as an adverse witness, testified that he has lived in Louisa County, Virginia, some fifty years.

He was asked whether on September 6th, 1930, he signed a note on the American National Bank for $36,450.00, to which question defendant by counsel objected on the ground that it related to borrowing money, not purchase of stock, which was another contract and did not show a joint purchase, and was irrelevant and immaterial. The Court overruled the objection and the defendants excepted on the grounds stated.

Witness stated that he signed such a note in the Fall of 1930.

The same objection was interposed to all evidence with respect to the note in question, and to the admission of the note and of all evidence relating to said note the defendants excepted on the grounds stated.

[fol. 33] The plaintiff then showed the witness a copy of a note, the material parts of which are as follows:

OFFER IN EVIDENCE

"$36,450.00 Richmond, Va., Sept. 8, 1930.

On demand after date we promise to pay to American Bank & Trust Co., Richmond or order, without offset, at American Bank and Trust Company of Richmond, Richmond, Va., thirty six thousand four hundred, fifty and no/100 dollars for value received, having deposited with the holder hereof as collateral security ——.

230 sh. 1st. Nat. Bank Louisa.
10 sh. sold cr. on note.

220 balance held.

Here follow the provisions as to sale, etc.

		Makers
9-9-30 By cash	$450.00	Waller Holladay, J. P. Donnally
8-13-31 By cash (stock sold)	1,500.00	P. B. Porter, T. S. Winston,
Int. pd. to 3-1-33.		U. M. Gentry, L. P. Chisholm,
		W. Earle Crank, C. L. Perkins
		W. R. Dunkum, W. Worth Smith Jr.
		H. W. Porter."

(Omitted provisions are those usual to collateral notes.)

Witness stated that it was a copy of the note he had signed, he could not recall who had signed the note when he did, but several had.

To the question whether witness had brought suit in the Circuit Court of Louisa County against the other ten makers, the defendants objected on the ground that such had to

do with liability on the note and was irrelevant to the purchase of the stock. The Court overruled the objection and [fol. 34] defendants excepted on the grounds stated. And the same objection was made to all evidence relating to a suit brought by this witness in connection with the liability on the note in question, pleadings and judgment.

"The Court: The stock was subscribed for. That is one agreement between the people. They went down and made a joint promissory note for a certain amount. That is another agreement. A joint judgment was rendered against them."

The witness stated that he had filed a supplementary pleading against C. L. Perkins and that it had alleged that Perkins' share will exceed $15,000, as not over $8,000 could be recovered from the other co-makers.

Q. Then there was an agreement between you that your share of the loss should be limited to one-eleventh?

A. We agreed to take one-eleventh of that stock.

Q. But where any man didn't pay his part you alleged the others had to make up for his share, don't you?

A. We didn't have any agreement to that effect.

Q. Isn't that what you have charged against Mr. Perkins in Louisa, that those who can pay have to pay for all the ones that can't?

A. I don't know that I charged that to Mr. Perkins.

Q. You don't claim that the $15,000 that you asked Mr. Perkins to pay is one-eleventh of the note, do you?

A. It seems to me Mr. Perkins has got two cases mixed up together but I am no lawyer.

Q. The whole liability, including the attorney's fee and costs, was about $37,000, wasn't it?

A. Yes, sir.

Q. And you are asking one of the co-makers to pay $15,000, aren't you, out of $37,000?

A. (No response.)

Q. Isn't that what you are doing?

A. I thought he was suing on the eleventh part."

He was suing Perkins for $15,000 contribution as one of the signers of the note for $36,450 in the American Bank, as he would not be able to collect more than $8,000 from the other signers; there was no other judgment against him

and no suit against him except the present one for $22,000 stock assessment.

The note for $36,450 was put in American Bank to pay [fol. 35] for all the stock; neither he nor any of the others put in any cash when the stock was bought, but they offered to do so; all who signed the note were directors, named as follows: Walter Holladay, P. B. Porter, J. P. Donnally, T. S. Winston, U. M. Gentry, L. P. Chisholm, W. Earle Crank, C. L. Perkins, W. R. Dunkum, W. Worth Smith, Jr., and H. W. Porter, and no others; the collateral for the note was the stock and each one said his eleventh part would stand for it and each one agreed to have one-eleventh part and put it up as collateral; he signed no certificate and never saw it or asked to see it.

Q. The agreement was that the stock you bought was to go up for the note?

A. Each one said his eleventh part would stand for it.

Q. All the stock bought by the directors was put up for that note except Jesse Donnally's ten shares?

A. And each one agreed to have one-eleventh part and put it up as collateral.

Q. Did you sign any certificate for one-eleventh, to endorse only one-eleventh?

A. I didn't sign any certificate but I got a receipt to show I paid for one-eleventh.

Q. Where is your receipt?

A. Mr. Walsh has them.

Q. Let me see it. You directors agreed to take all of that stock that wasn't taken by the stockholders?

A. We agreed to take our eleventh part.

Q. You all agreed as a Board that there would be none of that stock unsold?

A. We agreed that that stock should be sold to people in Louisa County and each one of us subscribed to one-eleventh part.

Q. And whatever was not sold the Board was going to take?

A. I didn't know anything about that.

Q. All that wasn't sold to others the Board took, didn't it?

A. I suppose it did but I didn't agree to any of that."

American Bank agreed to carry the note until the stock was sold no matter how long that was; he signed no renewal note; Mr. McDonald bought ten shares of the stock; the proceeds of the big note went to the credit of First National Bank of Louisa, but he had nothing to do with the bank; he resigned as director in 1931 because he was in business in West Virginia and was not able to come home.

[fol. 36] Q. Wasn't the $37,500 item big enough for you, as a director, to pay some attention to?

A. I suppose so. I agreed to take an eleventh part of it, which I did do.

Q. You agreed to take an eleventh part of the note?
A. Yes.

Q. And you are paying more than one-eleventh?
A. Yes, sir.

Q. You are actually paying more?
A. Yes, sir.

One certificate of stock was issued to J. P. Donnally, Trustee, and the reason the stock was put in the name of J. P. Donnally, Trustee, was so he, Donnally, could sell it to people in Louisa County; that they agreed to sell it to whom they agreed to sell it without having so much red tape, or anybody he wanted to, without talking to witness or anybody about it, and fixed it in Mr. Donnally's name as more convenient; witness understood 10 shares sold McDonald were cut off the joint block and that note will show whether $1,500 was credited on the joint note; Donnally had authority to sell any of the stock at $150 per share; witness figured he was liable for one-eleventh, the part he took and paid for and no more and never expected to have to pay more than one-eleventh and never expected any one else to pay more than one-eleventh; but all of them agreed it was one-eleventh part and pay one-eleventh of the loss, that is pay accordingly, and nobody would have to pay more; the original block was for 250 shares and he had a fractional interest in it and when ten shares were sold to the people he had the same interest in the remaining 240 shares and when ten more shares were cut off to Donnally he had a one-eleventh interest in the remainder and when ten more were cut off to McDonald he still had one-eleventh, each time there was any stock cut off it was cut off the joint block and he owned one eleventh of each share that was sold and retained one-

eleventh in what was left; and that ten shares were not taken out of his or anybody else's; if the stock had gone up and been sold for $160 or $175 the President and Cashier would have had to explain what to do with the profits and he supposed they would have had a meeting to devise what was to be done and that possibly he would and possibly he would not claim his share, but he did not go into it for profit; it would be human nature to claim part if any was handed to him; the capital stock was increased because [fol. 37] "they had more money than they really ought to have in cash", somewhere about $700,000 deposits and the capital of the bank was $50,000 and the Board decided to increase the stock; his family has lived in Louisa County, he has been working on work for C. & O. or B. & O., any job he could get; he couldn't tell whether State Bank at Louisa had increased its capital shortly before, doesn't know what its capital is; State Bank not a rival bank to his knowledge; there were just two banks in Louisa County, he did business with both, one was located on one side of street and the other on the other side, not 100 yards apart.

Q. How much of that 250 shares increase did you want to buy personally for yourself—any of it?

A. I would have taken one-eleventh or I took one-eleventh. That is what I agreed to take.

Q. How much did you want transferred to your name and pay for personally?

A. One-eleventh.

Q. Why didn't you take it out and pay for it?

A. Because we agreed, as I explained, to leave that for the benefit of the public in Louisa so the public would get it and we didn't go in for any profit.

Q. If you were going to leave it for the benefit of Louisa County, you didn't want to buy any particular share and get it in your name?

A. We agreed to take one-eleventh part which we did do.

Q. I understand that, about the one-eleventh; I have heard that in every answer but what I am asking you now is how many shares did you want to have registered in the name of L. P. Chisholm personally?

A. I offered to take one-eleventh but they said, "we will go along and sell them to the County". That is all I agreed to do.

Q. And how many shares did you offer to take?

A. One-eleventh part.

Q. And how many shares would one-eleventh be?

A. I don't know exactly how many shares it would be. It would be twenty-two shares, I think. I can't figure in my head.

Q. You wanted to take twenty-two shares?

A. I wanted to take one-eleventh part of that block. He never got a certificate for one-eleventh share, never collected a dollar dividend; that he paid one-eleventh and got a receipt to show, referring to interest on the big note; supposed dividends were credited to joint account in name of Don-
[fol. 38] nally, Trustee; bank paid dividends quarterly; stock was increased in September, 1930; Bank paid 6% at first and after some discussion they cut it to 4%; when interest was paid American Bank Donnally sent a statement; supposes Donnally's purchase was credited on the big note at the time he bought, but couldn't swear to it as he doesn't know, and thought Donnally owned one-eleventh of the remainder; and each of the others owned one-eleventh; when he gave that note he had a pretty good account, perhaps $15,000.00 and could have written a check for two or three times his one-eleventh, but did not do it because he agreed to take one-eleventh, some of them were not able to pay cash and all agreed to sign the note in order to go along so Mr. Donnally would have authority to sell it any time he got ready; they weren't able and we all agreed we would carry it along; Mr. Perkins said he was able, he offered to pay it same as witness and get his stock, and he agreed like witness to go along with the others on that note; some said they were not able to pay their part and decided it was best for the bank for all to carry it on together; he had fairly good contracting business; he went to Washington with his attorneys, Fulton and Walsh, in connection with the $22,000 stock assessment; American Bank sued all on note for $36,450; never voted one-eleventh of stock and never sent proxy; Donnally wanted ten shares so he could qualify as director.

Q. Wasn't that the reason you agreed to let him have ten shares?

A. No, sir, so he could sell that other and he wanted to agree to sell his eleventh part.

Q. You agreed to let him have ten shares so he could sell the other?

A. No, we agreed for him to sell the eleventh part. Witness never signed any subscription agreement, there was a verbal agreement they would take one-eleventh part.

On Cross-examination:

It was his understanding each one of the eleven would take one-eleventh part which they did and agreed to it and did it; the stock was not issued to each separately, one-eleventh part, but to Donnally, Trustee, because the Board of Directors so decided as some of them could not pay for [fol. 39] it and they signed a joint note for it, "and it would be one-eleventh part, each one of the eleven".

In respect to selling, there wasn't any profit contemplated, the stock was purchased at $150.00 per share and was to be sold at $150; during the time the stock was held pending sale each paid his one-eleventh part of the interest on the big note; when the note for $36,450, later reduced to $34,500, was executed the understanding in respect to liability of each was that each man was expected to pay his one-eleventh part of that note; in the purchase of the stock he was purchasing one-eleventh part and was raising that one-eleventh by this joint note; his understanding with respect to his rights with the American Bank to pay one-eleventh of the note and take down one-eleventh of the stock was that he could have paid the one-eleventh if he wanted to and take one-eleventh of the stock.

On redirect examination:

Witness testified with respect to this agreement with American Bank that Mr. Holladay offered to do it, but the agreement was not put in the note nor in writing and when asked if the bank let him off on one-eleventh, witness replied that he never asked to be one-eleventh.

C. L. Perkins, one of the defendants called by the plaintiff as an adverse witness, testified as follows:

He had been a director in First National Bank of Louisa mighty near since it was organized; in 1930 he, along with Mr. Chisholm and others, signed this big note for $36,450.

To this evidence relating to the execution of a note discounted at American National Bank and Trust Company, defendants objected, which objection was overruled, and defendants excepted on the ground that such evidence was irrelevant and immaterial to any issue here. Which objection and exception were interposed to all evidence relating to the execution and discounting of the note by which the purchase money was raised.

He agreed to try to pay one-eleventh instead of going on the big note, didn't want to go on any of it; was ready, willing and able to pay his one-eleventh; didn't mind own- [fol. 40] ing one-eleventh at that time, but they said that they wanted the stock in order to distribute it around among the people and he already owned twenty shares of it then, and "they didn't want us to own any more", they wanted to distribute it around amongst the others.

Q. And they wouldn't agree for you to pay your one-eleventh and stay off the note, would they?

A. No, sir. I asked about the note and, as I thought, the understanding was when they got this stock and got straightened out some of them said they didn't have the money and I don't know that anybody else really said they wanted to pay or anything of the sort, but I never had signed a note for other people and I didn't want to go on that one but I did go on it after they told me that the capital in the bank was more than the capital stock of the bank and that was the way they claimed to be taking it out, was to take care of that.

Q. And the rest of them on the Board persuaded you to sign that note?

A. Yes, sir, I got after them several times after that about it because I didn't want to pay interest on it and things of that sort and I asked Mr. Donnally about it several times and he stated that everything was going to the bad, I reckon was the cause of it, that he couldn't sell the stock for $150 and they weren't going to sell it and they were holding it but if he had told me the circumstances I would have said sell it if they haven't got but one hundred dollars or seventy-five—better have something than nothing, but they didn't consult me about that part of it.

J. P. DONNALLY, a defendant called as an adverse witness, testified as follows:

He was cashier of the First National Bank of Louisa when it failed and had been since April, 1917; he continued to work for it until June, 1933; at present time was manager of University Branch of Peoples National Bank of Charlottesville; capital of First National Bank of Louisa was increased in September 1930 for the reason that the deposits in relation to the capital had become top-heavy; there were two rival banks then in Louisa, the other the Bank of Louisa; he thought the Bank of Louisa in the latter part of 1929 increased its stock from fifty to one hundred thousand, and the two banks were just about the same size.

[fol. 41] To all the evidence about the other bank defendants objected, whereupon ruled

The Court: I don't think it is material, but go ahead.

His bank had been paying 4% on savings, they had been trying to reduce it to 3%; the prospects of reducing the rate on savings were brighter about the time they increased the capital than they had been; the effect on earnings would have been that they had about $600,000 on deposit and were paying $24,000 interest and the saving would be about one-fourth or $6,000; the Board of Directors had no plan of increasing dividends out of that saving, had never discussed the increase of dividends, but recognized there would be a difference in earnings; it is possible some had discussed making the stock 8% stock if they could reduce the interest; such was his idea; it would increase the value of the stock considerably, and 8% dividend would have paid the same net return on a stock of $200 that 6% would on $150; the witness was asked if he had been able to sell that stock at $200 a share, what would become of the profits, how they were to be divided.

To this evidence the defendants objected on the ground that the evidence shows that the stock was to be sold at the same price at which it was purchased and that there was no profit contemplated. But the Court overruled the objection and admitted the evidence, to which ruling the defendants excepted on the grounds stated.

A. It would be divided out among the eleven holders of it, each getting one-eleventh.

When the dividends didn't meet the interest, he assessed each one of them one-eleventh of the difference; the directors underwrote the whole 250 shares and agreed to take it all if outsiders didn't take it and when the day arrived that the note was to be signed he had sold outside only ten shares; when the note was signed three shares hadn't been collected for and he made a credit on it afterwards; it was originally written to pay for 243 shares, $36,450; the American Bank was going to carry the note whether it was 240 or 250; signed by all the eleven directors and nobody [fol. 42] else; it was never curtailed but there was a credit put on from the sale of ten shares to an additional director when he was elected to the Board after the note was given, $1,500 credit; he kept a bank account in the First National as J. P. Donnally, Trustee, to place dividends in and pay the interest; all dividends except the last cleared through that account; several dividends they didn't accept, two or three; as far as cashed they were put in his Trustee's account; in answer to the question "Then you made assessments on the different members, didn't you, as Manager?" he answered, "Yes". That he wrote a single check against the Trustee's account to pay interest on the whole note up to the last payment which was, he thinks, collected by him from the individuals in cash and notes and sent to Mr. Sands, President of the American Bank; he voted the stock at all meetings without asking authority; none of the directors appeared and asked to vote their one-eleventh or asked for one-eleventh of dividends, which came to him (Donnally) as a unit; he sold to McDonald without getting authority from any of the Directors, feeling that he had authority as they gave him that authority when the stock was placed in his hands as Trustee; had oral authority to sell at $150, but he couldn't say that he had authority to sell in big blocks, but they had agreed that five shares would be enough for any man in the County unless there was some exception like the McDonald case; he endorsed the old certificates and issued a new one in his name as Trustee when he sold to McDonald; he got ten shares in order to qualify as director; he owned one-eleventh of 230 shares, or around twenty-some shares, and asked and received permission of the other eleven to withdraw ten shares

and accept his name on the note as payment in full for the 22 shares, and hold the ten shares free of encumbrance; he then owned 12 shares in the block and not one-eleventh, his percentage being smaller after he did that.

On cross examination, the witness was asked concerning an inquiry from an examiner as to the ownership of the stock and how it was held, the purpose of the question being to show that the thought that one-eleventh interest in the stock was held by each director was not a new idea. He said he made an oral report, in answer to the examiner's inquiry, which was made in the course of the examination of the bank by the official bank examiner.

[fol. 43] Upon objection by the plaintiff, the Court asked:

Q. Was it incorporated in any written report to the Comptroller?

A. Judge, I couldn't tell that. I gave it to him. I suppose he put it in there. I don't know.

Thereupon the Court sustained the objection, saying:

Any formal reports or anything issued in the regular course of business to the Comptroller would be admissible. Some casual inquiry made by a bank examiner would not be.

Witness further testified that in July of the years 1931 and 1932, he filed in the Comptroller's office, as required by statute, a report of the stockholders of the Bank, which showed the 220 shares in his name as Trustee and no more; an appraisal of the assets of the Bank was made by the Comptroller's office in April 1933; interest on the large note was paid by his check as Trustee; he sent notices to each of the makers and asked for a check for one-eleventh of the interest and each paid one-eleventh; there was no possibility of profit, as he had orders to sell at $150, the price at which it was bought; the dividends did not quite equal the interest on the note; each of the gentlemen paid one-eleventh of the difference; there was no agreement as to how the stock should be voted, but if any one had declined to have him vote it, he wouldn't have done so; there was no agreement as to who should vote the stock.

The plaintiff, W. B. Gilmer, testified that he was appointed Receiver of the First National Bank of Louisa on October 10, 1933, and produced the certificate of his ap-

pointment; the Bank, which is a national bank, was closed at the end of business on March 4th, 1933 (a copy of the charter of the bank was introduced showing it was a national bank); a fifty per cent dividend had been paid under a Spokane Plan Contract by means of which a purchasing bank took over one-half the assets and the remaining half are held fully responsible for repayment of what they put out; the prospect for further dividends is reasonably slim, but he hopes to pay ten or twelve cents if he can collect on stock liabilities; the Comptroller made a 100% assessment [fol. 44] of stock on December 14th, 1933, payable January 22nd, 1934, and notices were sent to all stockholders, including notice to the manager of the block of 220 shares and an individual notice to each of the directors demanding full payment of $22,000 jointly and severally; the assessment authorized suit; the increase in stock of 250 shares was authorized September 11, 1930.

The proceeds of $36,450 note were placed to credit of First National Bank of Louisa on September 9, 1930; a block of 230 of the new shares were originally issued in September, 1930, to J. P. Donnally, Trustee, 2 shares to B. E. Martin, 5 shares to Stella G. Moss, 1 share to R. N. Harris Jr., 2 shares to A. C. Goodwin, 10 shares to J. P. Donnally; only B. E. Martin and Stella G. Moss were already stockholders; the stub of the 230 share certificate reads "J. P. Donnally, Tr. L. P. Chisholm" and the certificate reads "J. P. Donnally, Tr. L. P. Chisholm" and with later writing "et als."; the endorsement for transfer shows "J. P. Donnally, Tr. L. P. Chisholm, et al." and the certificate was turned in for cancellation August 1st, 1931, there being issued in its place a certificate for ten shares to R. S. McDonald, one for 20 shares to J. P. Donnally, Trustee L. P. Chisholm et als., and 200 shares to J. P. Donnally, Trustee L. P. Chisholm. (The certificates were exhibited to the jury.)

The American Bank originally held as collateral 230 shares and finally one certificate for 200 shares and one for 20; the dividends on this stock and J. P. Donnally's stock were paid to J. P. Donnally, Trustee, and J. P. Donnally credited them to the J. P. Donnally Trustee account, and in latter days when things were not so strong the Directors instead of taking out their dividends actually returned them

to undivided profits account. (Dividend checks were exhibited to the jury and the ledger sheet of the J. P. Donnally Trustee account.) The five charges to the account are the same as the interest payments on the note at the American Bank.

Witness further testified, after objections to the testimony had been made by defendants, which were overruled, and exception noted on the ground of immateriality, that on September 6, 1930, the following named gentlemen had on deposit and were liable to the bank as follows:

[fol. 45]

	Deposit	Direct Liability	Indirect Liability	Total
T. S. Winston	0.00	$6,900.00	$7,280.63	$14,180.63
W. Worth Smith	53.71	6,916.00	11,585.05	18,501.05
Waller Holladay	00.00	6,000.00	7,837.20	13,837.20
P. B. Porter	570.61 (overdrawn)	6,982.29	2,605.00	9,587.29
H. W. Porter	515.22	4,497.80	100.00	4,597.80
J. P. Donnally	120.09	4,875.00	2,817.89	7,692.89
W. Earl Crank	1,148.68	6,800.00	12,025.89	18,825.89
L. P. Chisholm	16,717.81	.....	.....	.....
U. M. Gentry	9,824.58	.....	2,200.00	2,200.00
C. L. Perkins	117.34	500.00	.....	500.00
W. R. Dunkum	0.00	3,900.00	2,500.00	6,400.00

[fol. 46] Prior to the new issue of stock the directors who purchased this stock owned about 75% of the stock of the bank and after the new issue about 90%; he had examined carefully the records in the bank and at Washington and found nothing to show who were the owners of the stock other than J. P. Donnally, Trustee; he received a reply from Mr. Chisholm, or his counsel, dated January 17, 1934, to the notice of assessment and demand for payment sent him, denying liability.

Motion for Directed Verdict

At this point in the testimony the plaintiff rested and the defendants moved for a directed verdict, on the grounds that the evidence showed the defendants were owners of one-eleventh interest as mere tenants in common and nothing is shown to create a liability for a greater amount than the amount of their respective interests in the stock in question, and that there was no special combination, nothing in the nature of a joint adventure or limited partnership for profit, as alleged. The motion was overruled and the defendants excepted.

Evidence for Defendant

P. B. PORTER, one of the defendants, a witness for the defendants, testified: he had been Clerk of the Court in Louisa County since 1913, had lived in Louisa all his life and had been president of the bank from its organization until it closed; in 1930 it was suggested that deposits in the bank greatly exceeded the capital, and an increase in capital would be along good banking lines; the increase was taken up with the Directors in midsummer, June 21, 1930, and at that time it was said that such of the new stock as was not taken up under preemption rights should be placed in the hands of a Trustee, Mr. Donnally, and that the stock should be distributed and sold over the county as widely as possible; the Directors had the privilege of taking the stock; each was to take one-eleventh part, each to pay one-eleventh at the rate of $150 for each share of stock they took; each was to get 21 or 22 shares or something like that; that was the understanding he had with each of the others. Asked what was said about how they were to pay for it, witness answered that the whole issue was already paid for and held by Donnally, Trustee, and he presumed it was to be divided up and paid for as best they could.

The witness stated that the ownership of each in the stock [fol. 47] to be issued to Donnally, Trustee, was one-eleventh; it was put in Donnally's name more for convenience than anything else so that in issuing stock sold everybody wouldn't have to come and change their certificates, he was purchasing at $150 a share and Mr. Donnally was to sell at $150, profit was not considered at all; Mr. Donnally didn't own any stock and wanted to be a director and by arrangement with American Bank and Trust Co. they permitted him to have issued to him ten shares of stock; he didn't know that there was any agreement as to the right of any one to have his one-eleventh set off to him, or that it was discussed, but he always felt he owned one-eleventh of the stock.

By the Court:

Q. What interest did you have in the 220 shares?

A. As I said formerly, sir, my interest was one-eleventh. That is what I considered.

He paid one-eleventh part of the interest to Mr. Donnally and presumes that Donnally sent it to the American Bank & Trust Company.

Cross examined, he stated that in 1930 he bought stock along with the other directors and borrowed money on a joint note to pay for it; he didn't write any check, but just put a note in the bank along with all the other joint purchasers; no length of time that the note was to be handled by American Bank was specified, he understood it was to stay there until they could dispose of the stock; he might have been one of those that persuaded Mr. Perkins to come in and had some trouble persuading his brother, Dr. Porter, to sign the note but that others also talked to him; there were a good many interested in getting the whole board on the note and having them all buy the stock together; Mr. Donnally had no right, when he sold, to take it except equally off the directors, or rather the whole 240 shares, and couldn't sell off the 20 shares or whatever he (Porter) was claiming; whenever Donnally sold one share he was selling one-eleventh of his (Porter's) shares and one-eleventh of Chisholm's and one-eleventh of each of the others; Donnally was his nephew, and he was one of the ones that hoped to get the savings interest cut from 4% to 3%.

[fol. 48] Defendants objected to this evidence as being too remote. The objection was overruled and defendants excepted.

This would make a saving of about $6,000 a year; he did not plan to increase the dividends but to increase the surplus; the stock was selling at $150 then and he did not think it would go up in the near future, but thought that it would in the next three or four years go to $175 or $200; there was no expectation of profit; three-fourths of the deposits were savings upon which 4% was paid amounting to about $24,000 or $25,000 a year and it was hard to pay the dividend and create a proper surplus and undivided profit; it would have been bad policy to increase the dividend; if the stock had gone up the profit would naturally have inured to the eleven men who owned the stock and would unquestionably have been divided equally; the loss on interest was shared equally; each paid his one-eleventh of the interest to Donnally who put it in one trust account and sent one check to Richmond, and all dividends were put into that account; Mr. Donnally always voted that stock

at meetings, as he had the privilege of doing; he presumes as a unit; he never endorsed any certificate when the stock was put up as collateral or signed as owner the new certificate issued to McDonald; if the stock hadn't been sold to the people of the county or contiguous counties, he presumed it was to be divided among the directors but he had no idea when; each director would then have to pay his one-eleventh of the note; the stock was taken in Donnally's name for convenience and put up as collateral; it was to be disposed of over the county generally; he doesn't think the question of whether one of the directors might sell his stock in advance and cut the price ever arose; if Mr. Donnally sold ten shares each would own the same interest in the 210 shares that he had in the 220.

WALLER HOLLADAY, one of the defendants, a witness for defendants, testified that he was a director in 1930 and also a director in the American National Bank of Richmond. In September the stock of the First National Bank of Louisa was issued; it was agreed that each member of the Board would subscribe to one-eleventh of the stock; he bought one-eleventh and that was the agreement of all the [fol. 49] directors; it was arranged that the stock was to be paid for by execution of a demand note signed by the directors, or the men constituting the Board; it was signed by the individuals who were the directors; the note was negotiated with the American Bank and Trust Company with 230 shares as collateral, it was dated September 8, 1930, for $36,450, with some credits leaving $34,500; the stock was deposited by Donnally as Trustee with the American Bank and Trust Company as collateral for the note; at the time the stock was issued it was thought advisable to broaden the influence of the bank through the county, and distributing the stock in small quantities would be a good way to do it; to avoid the necessity of writing eleven certificates every time a share was sold it was thought advisable to put the stock in one certificate to avoid confusion and unnecessary labor; the stock paid for some time 6% on par and the difference between that and the price at which the stock was purchased was paid proportionally one-eleventh by each signer of the note; dividends were paid on the stock to Mr. Donnally as Trustee and placed to his

credit as Trustee, he would then ask each director to pay his proportionate amount in order that the aggregate might pay the interest due the American Bank and Trust Company; each director bought one-eleventh interest; Donnally was not a director at the time the stock was bought, but he bought one-eleventh and immediately qualified as a director by withdrawing ten shares with the consent of the others; it was agreed that Mr. Donnally should sell that stock to such persons as he thought advisable for the best interests of the institution, the idea being that the stock would be distributed in small lots, at $150 per share; that it was bought at $150 and not bought for profit.

On cross examination, witness testified that he signed the note for no reason whatever except his interest in the little bank in which he was very much interested; and thought it advisable to increase the stock to widen the influence of the bank in the county, to distribute the stock; he owned 20 shares in addition to the 220 share block; he has paid nothing on account of the assessment on the 20 shares, and has paid nothing for the 220 shares except the proceeds of the joint note; the 220 shares were represented by one or two certificates in the name of J. P. Donnally, always voted [fol. 50] by Donnally; he had a one-eleventh interest, but if somebody had gone to Mr. Donnally and wanted to buy five shares off his (Holladay's) stock, Donnally couldn't have sold that stock off from any part without consulting the other directors and without getting the consent of all of them he couldn't sell any and charge it up to an individual interest.

Q. It had to be off the common interest?

A. I should like to say, in way of explanation, that had I gone to Mr. Donnally and asked that my stock be delivered to me upon payment of $150 per share I would have had every right to have withdrawn my stock.

Q. But if John Smith came to him and wanted to buy ten shares at $150 a share he couldn't sell it from any one of the directors' interests; it had to come off the common interest?

A. He would have sold it from the entire lot.

Q. And he had no right to sell it from any one share in the common lot, did he?

A. No.

At the time the note was signed Mr. Perkins made no formal protest to the board, but he heard Mr. Perkins remark that he could pay for his part, but at the suggestion of Mr. Gentry Perkins went along with the other directors; he doesn't recall any protest or any coercion in signing this note, in paying for the stock, either by note or cash; he cannot say that the majority protested against any one taking their stock and paying for it; when the stock was reduced to 220 shares, 20 shares could have been issued to each one of the owners; that if eleven certificates for 20 shares each had been issued and "John Smith wanted 10 shares and they wanted to cancel one 20 share certificate, taking ten of that and giving it to John Smith and leaving ten in the name of the seller, the only question involved would have been with the American Bank & Trust Company as to leaving one off the note, for if any one had sold his proportionate part he would naturally have asked to be left off the note; the question never arose; he doesn't say that there would have been any objection but there would have to be negotiation with the American Bank & Trust Company; each signer of the note subscribed to one-eleventh for the purpose of distributing the stock over the coun- [fol. 51] try; his relationship to the bank was not such as to justify his having any more stock; it was his understanding that the stock would always be taken down on a proportionate basis, but the question never arose, and Mr. Donnally was never instructed, by him, or any one else to sell any particular stock; there was no written subscription agreement; in financial statements made by him since that time he has never shown any interest in the 220 share block of stock, and simply made a note to the effect that the note was outstanding, that he was one of eleven joint makers, and that the note was secured by the stock, but he did not specify the interest.

P. B. Porter, being recalled, testified that in March 1933, shortly after the bank closed, he gave a financial statement and did not list any interest in the 220 shares as an asset or the note as a liability.

W. Earl Crank, one of the defendants, testified that he has been Commonwealth's Attorney in Louisa County for

about twelve years, and commenced practicing there in 1916; he was director and counsel for the First National Bank of Louisa from 1927 on; increase in capital was first officially brought up in June 1930; there was discussion as to whether it could be sold in the county, and quite a few were of the opinion that it could be and they passed a resolution on that date to increase it; subsequently they had a stockholders' meeting which ratified the increase and rights to subscribe were issued terminating in about thirty days, and were sent out to all the stockholders; at the next meeting of the Board only a small amount had been subscribed and Mr. Holladay suggested that the members of the Board subscribe, each to his proportionate share of the residue of the stock, eleven of them including Mr. Donnally; it was his understanding that each agreed to take his proportionate part, one-eleventh of whatever number of shares was unsold at that time; Mr. Holladay said that Mr. Sands said they could get the money from the American Bank and Trust Company, and probably on that day the note was signed by himself and others to raise the money to pay cash for the stock; something was said about the stock paying 6% and each agreed to pay one-eleventh of the difference; the subscribers were to pay $150 a share; the stock was to be placed in Mr. Donnally's name to be put up [fol. 52] as collateral security with the note and Mr. Donnally was going to undertake to sell the stock at $150 a share; they did not buy it for profit; he never heard any suggestion of profit; he bought at $150 and was going to sell at $150; it was placed in Donnally's name as a matter of convenience in putting it up as collateral and also in selling; they expected it to be sold and distributed; the dividends were applied to interest and each of the signers paid one-eleventh of the difference; witness has no recollection of Donnally voting the stock but never heard anybody else claim any right to vote any of it.

On cross examination, witness testified that he understood the American agreed to carry the note until the stock was sold and disposed of; he never expected to pay anything on the note except interest; as far as he is concerned there was no plan as to ultimately dividing any of the stock among the different directors and issuing individual certificates; he as an individual never expected to have any of that 220 shares issued in his name personally as he

bought it for the purpose of reselling it; nothing was said about any profits if the stock had gone up to $175 or $200 and none contemplated; as to what would have happened if something else had happened that is a mere matter of guess; it is a matter of speculation whether if he had made any profits the only thing to do with them was to divide them one-eleventh; they didn't contemplate any profit and nobody thought about any profit; the stock was put entirely in the name of Jesse Donnally, Trustee, and the understanding he had was that any sales made would have to be made from the common block, and he understood no one of the directors was to sell his interest ahead of the others; as long as it was in Donnally's name as Trustee whatever sales were made had to be made from the common block; under the instructions given Donnally couldn't sell off to John Smith 5 shares of Mr. Crank's or Mr. Holladay's or Mr. Anybody Else's, as he understood them, but had to come off the 220 share block under his instructions; whatever was realized from the sale had to go on the note at American Bank until it was fully paid; he has no recollection about Donnally's voting that stock at stockholders' meetings and couldn't say; he never tried to vote any interest in it, and as far as he knows none of the others did, but may have, but he has no recollection.

[fol. 53] There is a Mr. Crank in Louisa who works in the Bank of Louisa, who is a first cousin of witness; he doesn't know what is the capital of the Bank of Louisa; the Bank of Louisa increased its capital somewhere along about the same time the First National Bank of Louisa increased its capital.

W. Worth Smith, Jr., one of the defendants, testified that he was an attorney, State Senator from the 28th Senatorial District for three terms, and a resident of Louisa County since 1911, was a director and inactive Vice-President of First National Bank of Louisa, having been a director since the bank opened; In April or May at the close of a Board meeting the matter of increasing the capital was discussed; Holladay suggested that all unite in one note of $37,500 and get the American to handle that note; he thinks Mr. Donnally figured out what would be the respective liabilities of the makers, assuming that all eleven

executed the note, and the number of shares that each director would get, and that was done by dividing in eleven equal parts; the matter was left open at that time; he was not present at the next meeting; he assumed he was buying in accordance with the first meeting, namely one-eleventh; he never really felt he was buying any, but was an accom-odation maker of the note for the benefit of the bank and depositors, and it was signed on an understanding with Mr. Holladay, Vice-President of the American Bank, or at least his understanding that the American Bank would carry the note with the stock attached until the stock had been distributed among the people of Louisa County and adjoining counties; the stock was placed in Donnally's name for convenience in order that he might distribute the stock from that block; Mr. Donnally and Mr. Porter, Cashier and President of the bank, were of the opinion that it could be distributed throughout the county within a reasonable length of time; the price at which the stock was purchased was $150 and was to be sold at $150; there was no expectation of profit and the only loss involved was the difference between the dividends on stock and the interest paid to the American Bank; the stock was paying 6% on $100 which was later reduced to 4%; the right of any one to have one-eleventh set off was not discussed.

On cross examination witness further testified that Mr. [fol. 54] Donnally figured the liability for each on the note of one-eleventh and they were buying stock in proportion to their liability on the big note; he never felt he owned any of the stock; he was looking to the American Bank to wait until that stock was sold; the American agreed to carry that note until the stock was distributed and in the meantime they were to pay the difference between the interest and the dividends; they got the dividend and added to it to make the interest, the dividend not coming to him personally, Mr. Donnally handling all of them; the dividends went into the account of J. P. Donnally, Trustee; he made payments to Mr. Donnally; he never saw the stock and never voted any of it.

On redirect examination witness stated that Donnally sent them a little notice that carried on it, "Your one-eleventh part is so much," and then they paid it in accordance with the notice; the purpose of taking all the stock in one block was to get the money and to sell the stock

immediately and closed out the transaction as far as the Government was concerned; get all the money at one time and not wait until the stock could be sold to Tom, Dick and Harry throughout the county; during that time they were simply financing it with no intention on the part of anybody to increase their individual holdings and it was put in the name of J. P. Donnally, Trustee, solely for the purpose of convenience in distribution among the prospective ultimate holders; while it was never discussed, it was his idea that any sales were to be off the whole block and Donnally was not to sell any individual's stock; the object of taking the stock in this way was not that the named persons would eventually become the owners, but the purpose was to distribute it through the sections; the eleven named persons were a sort of avenue of distribution of the stock; he had ten shares before and wouldn't assume a liability of $60,000 to get a profit on ten shares.

W. R. DUNKUM, one of the defendants, testified that he was a resident of Louisa for thirty years, a merchant and farmer, who had been a director of the First National Bank of Louisa for three or four years; when the question of selling the new stock came up he proposed to buy one-eleventh as he understood it and did buy one-eleventh of the amount they issued, 220 shares or something like [fol. 55] that had not been sold to others; the stock was issued to J. P. Donnally, Trustee, for convenience of selling the stock around to the people in the county; they thought it would help the bank's business and while he signed for it, he really wasn't able to buy this part but felt responsible for one-eleventh of it and part interest on the joint note at the American Bank, of which he paid one-eleventh when Mr. Donnally sent a notice that it was due.

THOMAS S. WINSTON, a defendant, testified that he was a member of the firm of Winston Brothers, general contractors, and a resident of Louisa County for all his life, a director and Vice-President of the First National Bank of Louisa since its organization; it was his agreement that he was to take one-eleventh of the new stock; when the

question arose as to financing the increase in capital it was agreed, after several interviews among the directors, to issue a note for the amount of the stock and the American Bank agreed to carry the note for certainly a reasonable time until the stock could be distributed; it was put in the name of J. P. Donnally, Trustee, simply as a matter of convenience in making a distribution among the people of the county or whoever would purchase it; the purpose of selling not to the directors but to the general public was to benefit the bank; the stock was purchased at $150 a share and was to be sold at $150 per share, no profit whatever being contemplated.

On cross examination witness testified that he was probably there when Mr. Donnally calculated the liability of each of the directors on the note.

Q. And the ownership of the stock was to be the same as the liability on the note?

A. Each one-eleventh.

Q. And your liability on the note was to be limited to one-eleventh?

A. Yes, sir.

Q. So your ownership of the stock and the liability on the note followed the same way?

A. Followed the same way.

He never gave a thought to a rise in the stock and never discussed anything of the kind; they hoped it would rise but nobody expected any profit out of it except the general stockholders; there was no agreement as to division [fol. 56] of profits, but they agreed to divide the losses equally, and would have shared the profit the same way as the losses were shared as far as the note was concerned.

J. P. Donnally, being recalled, testified that he purchased one-eleventh of the block of stock, whatever it might be, 250 shares or less; ten shares were taken up by the stockholders under their rights; the stock was placed in his name as Trustee in one block to save trouble in issuing stock to the public and so forth, for convenience in reselling it; they expected to sell the whole block to the public

and put it up as collateral to the note with the idea of taking it down as it was sold.

At this point the list of stockholders, Exhibit J. P. D. No. 1, was introduced as a statement by an examiner made up on information furnished by Mr. Donnally, for what it was worth.

On cross examination the witness further testified that the five charges on the ledger sheet of the account of J. P. Donnally, Trustee for L. P. Chisholm and others, were for checks to the American Bank and Trust Company for interest on the big note; he figured out the individual liability on the note several times to see what it cost him to carry the obligation; he started to make sales in the county; had orders from Washington that he could make the entries in the book and took subscriptions for several shares, ten or fifteen; he handled it on his own memoranda, did not advertise the stock but went to the different parties, and did not use any sales propotion argument; in endeavoring to sell the stock he thought he was representing the best interests of the bank, in trying to place it with influential parties in his own town that had made inquiries, and there was a selfish motice too in reducing his holding at the same time, being tied up for one-eleventh of it; they gave him complete authority to sell the stock at any time at $150; when he made a sale of ten shares he wrote the American Bank to send the block of stock and took it out of the holdings of all eleven, each having the same fractional interest in the remainder as he formerly had.

No further testimony was introduced.

[fol. 57] And thereupon the defendants rested, and the plaintiff also rested.

The jury retired.

DEFENDANTS' RENEWAL OF MOTION FOR DIRECTED VERDICT

Thereupon the defendants moved to renew the motion that the jury be directed to find a verdict for the defendants on the ground that it has been shown that this stock was held by them in these several interests, one-eleventh each, and that they are each liable for that one-eleventh part, that there is no such combination or relation between these

defendants which would justify a joint judgment for the entire amount against any one.

PLAINTIFF'S MOTION FOR DIRECTED VERDICT

Mr. McGuire: If your Honor please we, of course, object to that and we make a motion for a directed verdict on behalf of the plaintiff on the theory that we have proved this combination, we have proved the joint venture, we have proved all the elements necessary for a joint venture.

COLLOQUY

The Court: What is the effect of a motion by each side for a directed verdict? It takes the case away from the jury, doesn't it?

Mr. McGuire: I don't know.

The Court: That is what it does ordinarily. The Court doesn't have to do it but it is a very close question in my mind whether the Court will have to settle this case one way or another anyway that the verdict would go. That is the effect generally, gentlemen, when each side moves for a directed verdict. It takes the case away from the Jury, but the Judge doesn't have to do that if he doesn't so choose. I believe the later cases hold he may refuse to pass on the issue and submit it to a Jury.

Mr. McGuire: I was not aware that the two motions would take the case from the Jury.

The Court: It is discretionary with the Judge, I think, very largely. I would like to hear you fully on the law, the legal effect of this situation. There is not any very great conflict about the evidence. There is really not much issue to submit to the Jury.

Mr. Gilmer: The issues would come up on the charges to the Jury anyhow.

Mr. McGuire: I am going to withdraw our motion for the time being and take it up on the charge.

[fol. 58] NOTE.—The motion for a directed verdict was argued.

The Court: I don't have any doubt about my duty to overrule this motion. The question in my mind is whether I should submit the case to the Jury at all or not.

Mr. McGuire: Our view is that it should not be submitted to the Jury.

The Court: I haven't heard any motion to that effect.

Mr. McGuire: We make it right now.

RULING OF COURT

The Court: I think, gentlemen, that the Court should overrule the motion of the defendants to direct a verdict in favor of the defendants and sustain the motion of the plaintiff to direct a verdict for the plaintiff.

I have given as careful thought and consideration to the case as I could during the argument, trying to keep before me what I regard as the essential facts in the case about which there appears to me to be no substantial conflict, and it seems to me it would be an idle ceremony to submit the case to the Jury because if they were to find a verdict for the defendants, which I cannot conceive they should do under the law and facts of the case, the Court would have to set it aside and grant a new trial, resulting in two or more trials, whereas, if I am in error in my construction of this evidence and the law applicable to what I regard as the undisputed facts in the case, the defendants will be entitled to a verdict.

For that reason it seems to me that it would be idle to submit the case to the Jury on any charge.

In making those statements I have these points in mind: Shorn of all verbiage and all technicalities, I do not think there can be any doubt about the fact that this was a joint purchase of stock by these eleven defendants, all purchased pursuant to the one contract, whatever that contract was, at one time, and paid for by the proceeds of a joint note executed by all of the eleven defendants, to which note was attached the 220 shares of stock in question as collateral security. I believe a larger number of shares was attached originally and some of them were taken down. If I recall that part correctly, 10 shares were taken down and transferred to Mr. Donnally, the Cashier. There is a perfect and undisputed explanation of that, in that the law had been [fol. 59] amended so that a director in order to qualify as a director of a National Bank was required to be the owner of at least ten shares of stock in the bank and Mr. Donnally

was not, prior to that time, the owner of any stock; he was merely the Cashier.

Following the taking down of those ten shares, all of the purchase price of which was applied on the note for the benefit of everybody interested, that is the makers of the note, Mr. Donnally still, along with the other ten, was an owner of an undivided one-eleventh interest in the 220 shares remaining.

Up to that point there appears to be no conflict in the evidence. As I view the matter, the question finally to be determined is whether we have, in contemplation of law, only one stockholder, composed of eleven undivided interests, or whether we have eleven distinct stockholders. If it is one stockholder in contemplation of law, all of these defendants are jointly and severally liable, certainly so far as the issues in this case are concerned, for the whole amount. If there are eleven distinct stockholders, each one is liable only for his eleventh part of the assessment.

We will have to review the object which these defendants had in mind when this transaction was first conceived. This little bank, as it has been referred to, seemed to have been a very prosperous bank and had a capital stock of only $50,000. It had deposits aggregating, if I recall the testimony correctly, about $700,000. The idea was advanced by one or probably more of the directors that the capital stock was too small for the amount of deposits. It is also indicated in the evidence that they had some competition with the other bank at Louisa and it was decided by these eleven men that it was advisable and for the best interests of the bank to increase its capital stock from $50,000 to $75,000. In that connection it is rather difficult to get away from the fact that these eleven men were, for all practical purposes, the bank itself, the undisputed evidence showing they owned seventy-five per cent of the entire capital stock, so that anything they did to further the interests of the bank certainly inured at least indirectly to their personal benefit. The problem with which they were confronted was disposing of the 250 additional shares.

I assume under the law applicable to National Banks that the then stockholders would have had the first right to sub- [fol. 60] scribe to the additional holdings in proportion to their then present holdings. They do not seem to have desired to follow that plan but they wanted, as far as they

could, to distribute the 250 additional shares throughout the community to make the holdings more extensive and thereby increase the bank's business, increase its deposits and increase its loans. In handling this as they did they had an object in view, to distribute that stock throughout said community as far as possible, and into the hands of as many different holders so as to increase the bank's business, thereby benefitting the bank and thereby benefitting themselves as interested parties in this bank. In addition to that they had the further object—and I do not see how there could be any controversy about the evidence on that point—of maintaining the price of the stock. Manifestly if this stock was distributed into eleven different holdings, separate and distinct one from another, some of whom were financially able to carry it indefinitely and others of whom were unable to carry it, sooner or later some would sell, thereby creating competition in the market and consequent reduction in the price. So they had the second object in view and that was to maintain the price at $150.

At first I was inclined to attach much importance to the fact that these men did not have in view buying this stock, forming a pool and selling it at a price above what they paid for it. I think it is patent that they did not contemplate selling it at more than $150 a share, but I do not think that is at all controlling in a case of this kind. It is one feature, but it is not controlling. They had then to form some plan to effect the objects that they had in mind, namely, the distribution of that stock throughout that community and maintaining the price of $150 a share. By very informal proceedings but proceedings of undoubted purport, they constituted the Cashier of the bank, Mr. Donnally, as their Trustee to hold this stock.

The question arises—for what purpose and for whom was Mr. Donnally Trustee? There is no evidence here, gentlemen, that Mr. Donnally was the Trustee to hold twenty or twenty-two shares for Mr. Chisholm or Mr. Winston or for any one, or to hold any particular number of shares for any particular person, but the evidence is that Mr. Donnally was the Trustee to hold 220 shares—at first a greater number—for the joint benefit of all of these eleven [fol. 61] directors. He was not holding any particular number of shares for Director A or Director B who would call on him from time to time and take it down and sell it; he

was holding the entire block for the benefit of all of these men for certain purposes and one purpose was to sell the stock from time to time in the community there to people other than the eleven, at the price of $150 a share, and when he made the sale of five shares or ten shares he did not sell Mr. A's stock or Mr. B's stock; he was to sell five or ten shares from the entire block. There is no conflict about that. The sale was for the benefit of all. It was a part of each undivided eleventh interest in that entire block of stock.

I think there was present a strong community of interest for a common purpose, to further a purpose common to all of these eleven men. There can be no doubt about that under this evidence. Mr. Donnally was Trustee for all of them.

The fact that if they had terminated their arrangement, informal as it was, each man upon getting that note out of the way would have been entitled to come up and receive twenty shares I do not think is entitled to great weight. The important point is what particular shares, if any, was he entitled to receive at the inception of the transaction, and I am bound to conclude none. He merely had an undivided one-eleventh interest in the entire block which was kept in a block under control of a Trustee for certain purposes, all of which inured to the common benefit of all. He was not Trustee for any particular man, for any particular stock, but Trustee for all eleven for the benefit of all eleven in the handling of the entire block of stock. Under those circumstances, gentlemen, I do not see how you can escape the fact that the evidence about which there is no conflict, shows that this was a joint ownership of this stock for a common purpose. It may not have been such community of interest as constituted a partnership; I do not think it was, but I also do not think that is necessary in a case of this kind, to make those who are interested in a block of stock jointly and severally liable, when an assessment is duly made by the Comptroller of the Currency.

I assume you gentlemen, particularly the defendants, have made a thorough search of the authorities and I am frank to say that no cases seem to be directly in point. The case of English v. Gamble, 26 Fed. (2nd) 28, from the 8th [fol. 62] Circuit, I think in principle is in point. While the point does not seem to have been argued at any great

length, the Court clearly held that those directors, under circumstances that were substantially similar to those here presented, owned the stock in question jointly. I think this case, if anything, is stronger for the reason that the entering into this relationship by these eleven defendants was a purely voluntary act on their part. They went into it, so to speak, with their eyes open, voluntarily, whereas in the case of English v. Gamble the directors were practically forced into it by the threat of the Comptroller of the Currency to close the bank if they did not do so.

Under all of these circumstances about which there seems to be no dispute, I do not see how there can be but one proper verdict, and that is a verdict for the plaintiff for the full amount. There is no question of fact for the Jury to decide. I think the defendants very properly in their motion have apparently conceded that.

It appears from the record that pleas of bankruptcy have been filed in this proceeding by the defendants, W. Worth Smith, Jr., P. B. Porter, J. P. Donnally and C. L. Perkins. It is further conceded by counsel for the plaintiff that the receiver has filed proofs of claim in bankruptcy against the defendants P. B. Porter, H. W. Porter, W. Worth Smith, Jr., J. P. Donnally and C. L. Perkins. Upon that showing the Court will dismiss the proceedings as to those five defendants.

Mr. Gilmer: Mr. May has suggested this: If these gentlemen are going to appeal he will concede the joint liability against U. M. Gentry's estate and if the appeal does not stand he wants to take advantage of it.

NOTE.—The Jury returned.

ORDER DIRECTING VERDICT

The Court: Gentlemen of the Jury, the view that the Court takes in this case is that it depends entirely upon the question whether or not these defendants owned this stock jointly. The Court has reached the conclusion from the undisputed facts that it was a joint ownership and therefore, being a joint ownership, defendants are jointly and severally liable for the entire amount instead of each one being liable for only one-eleventh and accordingly I

direct you to return a verdict against five of these defend-
[fol. 63] ants for the full amount. Five of them have filed petitions in bankruptcy and they will be dismissed. The verdict will be, "We, the Jury, at the direction of the Court, find in favor of the plaintiff against the defendants W. R. Dunkum, T. S. Winston, W. Earl Crank, Waller Holladay and L. P. Chisholm, in the sum of $22,000, together with interest from January 22, 1934, until paid". It turns on a point of law in the view I take and there is no issue of fact to submit to the Jury. Five other defendants have gone in bankruptcy and they have been discharged of the liability. The case as to one other is continued, on the ground of alleged mental incompetency, for trial later.

Mr. Fulton: We note an exception to the action of the Court in overruling the motion to direct a verdict for defendants and to the action of the Court in sustaining plaintiff's motion for a directed verdict.

MOTION TO SET ASIDE VERDICT

Mr. Walsh: We make a motion to set aside the verdict.

ORDER SETTLING BILL OF EXCEPTIONS

And on motion of the defendants this bill of exceptions is signed and sealed this 9th day of September, 1935.

(Sgd.) Luther B. Way, Judge. (Seal.)

On this September 9, 1935, it is ordered that the foregoing bill of exceptions be, and the same hereby is filed and made a part of the record within the time allowed by law and the rules of the Court.

(Dgd.) Luther B. Way, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME FOR FILING BILLS OF EXCEPTION—Entered & Filed August 7, 1935

On motion of the defendants, in view of the absence of Honorable Luther B. Way, before whom the above entitled case was tried from this district.

[fol. 64] It is ordered that the time within which the defendants may tender Bill of Exceptions to the Court to be signed and made part of the record be extended to and including September 10th, 1935.

(Sgd.) I. M. Meekins, United States District Judge.

August 7, 1935.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL WITH THE CLERK OF THE U. S. C. C. A.—Entered & Filed September 10, 1935

For good cause shown it is ordered that the time within which the record on appeal in the above-entitled case may be filed with the Clerk of the United States Circuit Court of Appeals, at Richmond, Va., be, and the same hereby is, extended for a period of thirty (30) days from the date hereof.

(Sgd.) Luther B. Way, United States District Judge.

September 10, 1935.

IN UNITED STATES DISTRICT COURT

STIPULATION TO PREPARE AND PRINT THE TRANSCRIPT OF RECORD ON APPEAL IN ACCORDANCE WITH RULE 23, OF THE CIRCUIT COURT OF APPEALS—Filed September 28, 1935

It is stipulated that the transcript of the record may be made and the record printed in accordance with the Provi-

[fol. 65] sions of Rule 23 of the United States Circuit Court of Appeals, Fourth Circuit.

(Sgd.) H. W. Walsh and M. J. Fulton, Counsel for Appellants. (Sgd.) George Gilmer, Murray M. McGuire, Counsel for Appellee.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF CLERK RE APPEAL PAPERS

Petition for appeal, filed July 2, 1935.

Order allowing appeal and fixing amount of appeal bond, entered and filed July 2, 1935.

Appeal and supersedeas bond, filed July 2, 1935.

Dated July 2nd, 1935.

Obligors: L. P. Chisholm, Waller Holladay, W. Earl Crank, T. S. Winston and W. R. Dunkum, as principals, and John R. Morris as surety.

Penalty: Twenty-six Thousand Dollars ($26,000.00).

Conditioned to pay all damages and costs.

Citation, issued July 2, 1935

Legal service accepted on September 20th, 1935, by Murray M. McGuire, Esq., of counsel for appellee.

[fol. 66] IN UNITED STATES DISTRICT COURT

STIPULATION OF COUNSEL AS TO WHAT SHALL CONSTITUTE RECORD ON APPEAL—Filed September 28, 1935

It is stipulated, pursuant to #3 of Rule 14 of the Circuit Court of Appeals, that the following portions of the record and proofs in the above entitled case shall be included in the transcript of the record for use in the Circuit Court of Appeals, Fourth Circuit, on appeal:

(1) The Notice of Motion for Judgment.
(2) Pleas in Abatement.
(3) Demurrer and Motion to Strike Pleas in Abatement.
(4) Motion to Dismiss for Lack of Jurisdiction.

(5) All other pleadings and all grounds of Defense.
(6) Motion to Set Aside Verdict.
(7) Bill of Exception No. 1, signed July 2nd, 1935.
(8) Bill of Exceptions No. 2, signed September 9th, 1935.
(9) All Orders of the Court, including orders of August 7th and September 9th, 1935.
(10) Assignments of error.
(11) Citations.

(Sgd.) H. W. Walsh and M. J. Fulton, Counsel for Appellants. (Sgd.) George Gilmer, Murray M. McGuire, Counsel for Appellee.

[fols. 67 & 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3970

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUM, Appellants,

versus

W. B. GILMER, Receiver for the First National Bank of Louisa, Louisa, Virginia, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

DOCKET ENTRIES

October 9, 1935, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under section 7 of Rule 14.

Same day, the appearance of H. W. Walsh and M. J. Fulton is entered for the appellants.

October 11, 1935, the appearance of Murray M. McGuire and George Gilmer is entered for the appellee.

October 15, 1935, stipulation as to time for the filing of the respective briefs is filed.

October 18, 1935, twenty-five copies of the printed record are filed.

[fol. 70] ARGUMENT OF CAUSE

December 3, 1935, (November term, 1935,) cause came on to be heard before Parker and Northcott, Circuit Judges, and Chesnut, District Judge, and is argued by counsel and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3970

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUM, Apellants,

versus

W. B. GILMER, Receiver for the First National Bank of Louisa, Louisa, Virginia, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

(Argued December 3, 1935. Decided January 6, 1936)

Before Parker and Northcott, Circuit Judges, and Chesnut, District Judge

[fol. 71] H. W. Walsh and M. J. Fulton for Appellants, and Murray M. McGuire and George Gilmer (Gilmer and Graves, and McGuire, Riely & Eggleston on brief) for Appellee.

OPINION—Filed Jan. 6, 1936

PARKER, Circuit Judge:

This is an appeal in an action instituted to enforce the statutory liability of stockholders of a national bank against whom an assessment had been made as provided by statute. The action was instituted by the bank's re-

ceiver, by notice of motion for judgment under the Virginia practice, against one L. P. Chisholm and ten other persons, who were alleged to have subscribed, in the name of a trustee, to 230 shares of stock of the bank as joint adventurers and to have been the real owners of 220 of the shares, which were held in the name of the trustee, at the time of the bank's failure. The action was dismissed against five of the defendants because of their having received discharges in bankruptcy. It was continued as to one whose administrator interposed a defense of insanity. And it was tried against Chisholm and four others, who first pleaded in abatement that no writ had issued against them and that the action could not be prosecuted on notice of motion for judgment under the Virginia statute without service of process, and afterwards excepted to the order ruling them into trial, after the cause had been continued as to one of the defendants.

At the conclusion of the evidence, both sides moved for a directed verdict, and the trial judge directed verdict for plaintiff for the sum of $22,000 with interest from the date of the stock assessment. From judgment on this verdict, Chisholm and the other four defendants against whom judgment was rendered bring this appeal, contending (1) that the action could not be instituted by notice of motion without service of process by the marshal and that the plea in abatement should have been sustained; (2) that there was error in trying the case on the joint liability after it had been continued as to one of the defendants; and (3) that, on the facts, there was no joint liability on the part of the defendants for the stock assessment, and that it was [fol. 72] therefore erroneous to deny their motion for directed verdict and to direct verdict against them.

The procedural questions can be briefly disposed of. It has been recently decided by this court, after full consideration, that notice of motion for judgment under the Virginia practice is a proper method of procedure for enforcing the statutory liability of a stockholder of an insolvent national bank, and that, on such notice of motion, it is not necessary that writ or other process be served by the marshal to bring defendants into court. Ely v. Gamble (C. C. A. 4th), 75 Fed. (2) 171. And we think it equally clear that under the Virginia practice it was proper to proceed against appellants notwithstanding the continu-

ance as to one of the defendants. It is true that the liability of defendants was joint; but the action was one for the recovery of money, and Section 6047 of the Code of 1930 provides:

"Sect. 6047. *Against whom of those liable, judgment may be given on motion.*—A person entitled to obtain judgment for money on motion may, as to any or the personal representatives of any person liable for such money, move severally against each, or jointly against all, or jointly against any intermediate number; and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice, but the judgment against such personal representative shall, in all cases, be several. Such motions may be made from time to time until there is judgment against every person liable, or his personal representative."

And it is well settled that the liability of the stockholder is contractual, being based upon his original stock subscription. Richmond v. Irons, 121 U. S. 27, 55; Matteson v. Dent, 176 U. S. 521, 525. As said by Chief Justice White in the case last cited, "the obligation of a subscriber to stock, to contribute to the amount of his subscription for the purpose of the payment of debts, is contractual, and arises from the subscription to the stock." This being true, there can be no doubt of the right of plaintiff to proceed to judgment against a part of the defendants jointly liable for the subscription under Section 6265 of the Code of 1930, without proceeding against the others. The perti- [fol. 73] nent portion of that statute is as follows:

"Upon all contracts hereafter made by more than one person, whether joint only or joint and several, an action or motion may be maintained and judgment rendered against all liable thereon, or any one or any intermediate number, and if, in an action on any contract heretofore or hereafter made, more than one person be sued and process be served on only a part of them, the plaintiff may dismiss or proceed to judgment as to any so served, and either discontinue as to the others, or from time to time as the process is served, proceed to judgment against them until judgment be obtained against all."

Coming to the merits of the case, we note that at the conclusion of the testimony both sides moved for a directed verdict. It is well settled that this amounts to a waiver of jury trial and a consent that the trial judge decide the issues and direct a verdict accordingly; and in such case, upon exception to an adverse finding and direction, the only question is whether the verdict as directed is supported by substantial testimony. In other words, the verdict must stand unless the party against whom it has been directed was entitled to have it directed in his favor. Williams v. Vreeland, 250 U. S. 295; Sena v. American Turquoise Co., 220 U. S. 497, 501; Buettell v. Magone, 157 U. S. 154; Barringer v. Dinkler Hotels Co. (C. C. A. 4th), 61 Fed. (2d) 82, 83; Swift & Co. v. Columbia Ry. Gas & Electric Co. (C. C. A. 4th), 17 Fed. (2d) 46, 49; Lawton v. Carpenter (C. C. A. 4th), 195 Fed. 362. The only question left for our determination, therefore, is whether, upon the evidence, defendants were entitled to a directed verdict. We agree with the judge below that they were not.

The eleven defendants against whom the suit was brought constituted the board of directors of the First National Bank of Louisa, Va. They owned 75% of the capital stock of that bank, which was only $50,000.00, and they owed the bank $47,371.00 on their own notes and were liable to it on loans to others to the extent of $48,971.00. It was thought that the deposits of the bank, amounting to six or seven hundred thousand dollars, were out of proportion to the capitalization and that it would be advan- [fol. 74] tageous to increase the capital stock by 50% and sell the new stock as widely as possible among the citizens of the county where the bank was located. Increase of capital stock was accordingly authorized and the price of the new shares was fixed at $150.00. Notice of the right to subscribe was given stockholders, but only a very few shares were sold in this way and none to the directors themselves.

In order to float the stock and distribute it in the county without depressing the price of $150.00 per share, the directors agreed to purchase the stock and hold it until it could be resold and to resell it if possible among the people of the county. The directors thereupon did subscribe for 230 shares of the stock in the name of J. P. Donnally, one of their number, as trustee, and raised the money to meet

their subscription by borrowing from another bank and executing their joint note for the amount. The stock was issued to and held by Donnally as trustee. He collected the dividends thereon and applied them toward paying the interest on the note, the additional amounts necessary for that purpose being put up by the directors. Ten shares of the stock thus purchased were sold, and the proceeds thereof were applied on the note.

Several of the defendants took the stand and testified that each was to own one-eleventh of the stock purchased; but it is clear that, while each had a one-eleventh interest in the enterprise, the stock was purchased as a result of the joint action of all, that it was paid for with the proceeds of a note that they executed jointly, that it was held in trust for their joint use and benefit, that they shared in the losses sustained as a result of the purchase, that the dividends received were applied for their joint benefit, that each had an equal voice in the management of the enterprise and that they would have shared equally in profits, if profits had been realized.

It is true that defendants did not expect to realize any direct profit from the resale of the stock, but the purchase and resale were intended to benefit them in ways other than the realization of a direct profit. The increase in the capital stock of the bank was necessary in view of the size of the deposits; and no one would benefit from this increase as much as would directors who owned 75% of the stock [fol. 75] and whose debts to the bank exceeded the capitalization. The purchase of the stock was clearly undertaken in an effort to strengthen the bank in which they were interested; and, that it was in fact a joint enterprise on the part of the directors, and not one which assumed the appearance of such an enterprise by accident, is shown by the fact that, while a number of the directors were financially unable to make purchases on their own account, the purchase went forward notwithstanding this fact. Only on the theory that the enterprise was engaged in by the board in a joint effort to strengthen the bank, can the fact be expained that the financially strong directors entered into the purchase with those who were unable to carry their part of the load. And this in effect is the testimony

of the defendant Chisholm. He said in explanation of why the matter was handled as it was:

"When he (Chisholm) gave that note he had a pretty good account, perhaps $15,000.00 and could have written a check for two or three times his one-eleventh, but did not do it because he agreed to take one-eleventh, some of them were not able to pay cash and all agreed to sign the note in order to go along so Mr. Donnally would have authority to sell it any time he got ready; they weren't able and we all agreed we would carry it along; Mr. Perkins said he was able, he offered to pay it same as witness and get his stock, and he agreed like witness to go along with the others on that note; some said they were not able to pay their part and decided it was best for the bank for all to carry it on together."

C. L. Perkins, one of the defendants, testified:

"He (Perkins) agreed to try to pay one-eleventh instead of going on the big note, didn't want to go on any of it; was ready, willing and able to pay his one-eleventh; didn't mind owning one-eleventh at that time, but they said that they wanted the stock in order to distribute it around among the people and he already owned twenty shares of it then, and 'they didn't want us to own any more,' they wanted to distribute it around amongst the others.

"Q. And they wouldn't agree for you to pay your one-eleventh and stay off the note, would they?

A. No, sir. I asked about the note and, as I thought, the [fol. 76] understanding was when they got this stock and got straightened out some of them said they didn't have the money and I don't know that anybody else really said they wanted to pay or anything of the sort, but I never had signed a note for other people and I didn't want to go on that one but I did go on it after they told me that the capital in the bank was more than the capital stock of the bank and that was the way they claimed to be taking it out, was to take care of that."

It is clear, we think, that, with respect to the purchase, holding and sale of the stock in question, the defendants were engaged in a joint enterprise. Of course they were not partners generally, but they unquestionably assumed

the relationship of partners with respect to this particular undertaking; and that is the essence of a joint adventure. Dexter & Carpenter v. Houston (C. C. A. 4th) 20 Fed. (2d) 647; Joring v. Harris (C. C. A. 2d) 292 Fed. 974; Reid v. Shaffer (C. C. A. 6th) 249 Fed. 553; In re Kessler & Co. 174 Fed. 906; Van Tine v. Hilands, 131 124; Delmonico v. Roudebush, 5 Fed. 165; Lyles v. Styles, 15 Fed. Cas. p. 1143, No. 8625; 33 C. J. 842; 15 R. C. L. 501; note 48 A. L. R. 1062 and 63 A. L. R. 914. Although combination for the purpose of making profits is ordinarily characteristic of a joint adventure, the purpose of making direct profits is no more essential to that relationship than to that of partnership. A joint adventure, we think, exists when two or more persons combine in a joint business enterprise for their mutual benefit, with an express or implied understanding or agreement that they are to share in the profits or losses of the enterprise, and that each is to have a voice in its control and management. It differs from a partnership in that it is ordinarily, although not necessarily, limited to a single transaction, whereas a partnership is ordinarily formed for the transaction of a general business (33 C. J. 842), and in that the interest of the joint adventurer may be recovered at law, and accounting in equity need not be resorted to as in case of partnership. Joring v. Harriss, supra. The relationship was defined by Judge Hough of the Second Circuit, in the case last cited as "a commercial enterprise by several persons jointly."

As was held in Bowmaster v. Carroll (C. C. A. 10th) 23 Fed. (2d) 825, upon which plaintiff relies, the purchase of property by two or more persons, each of whom con-
[fol. 77] tributes a portion of the purchase price, makes them joint owners of the property, but does not, without more, establish between them the relation of joint adventurers. 33 C. J. 842. But there is much more shown here than the mere purchase of the stock. That purchase was made, not as an end in itself, but as a means of strengthening the bank, an object in which all of the directors were interested. The purchase was a joint purchase, made with the proceeds of a joint loan for which a joint note was executed. The purchase was made in order that the stock might be resold to the advantage of the bank and its stockholders and it was placed under the control of a trustee in order that sales might be made by him. The dividends,

which were profits derived from holding the stock, were applied on the joint obligation incurred in connection with its purchase; and the funds necessary to pay the interest on the joint note, and thus to continue to carry the stock, were raised by equal contributions from all the defendants. Each had an equal voice in the control and management of the enterprise; and there can be no doubt but that the intention was that all should share equally any profits and losses resulting therefrom. If secret profits had been made by one of the defendants in connection with the handling of the stock, he could unquestionably have been required by the others to account therefor. In other words, what we have is not a mere acquisition of property by two or more persons, but an enterprise entered upon by them to acquire, hold and sell additional stock of a bank for the purpose of strengthening that institution in which they were interested, with the acquisition of the stock as one of the steps in that enterprise.

There can be no question as to the responsibility of the joint adventurers for liabilities incurred within the scope of the enterprise. 15 R. C. L. 505; 33 C. J. 871-873. And certainly it is too clear for discussion that a stock assessment on stock purchased in the carrying on of the enterprise is such a liability.

And we think that the same result follows if the relationship of the defendants as joint adventurers be ignored. Unquestionably they made a joint subscription for the stock through their trustee; and, if the suit were on this joint subscription, there would be no question as to their joint liabil- [fol. 7[illegible]] ity for the entire subscription price. Williston on Contracts Sec. 322; New Hayen & Northampton Co. v. Hayden, 119 Mass. 361 (Per Gray, J.); First Trust Co. v. Miller, 160 Wis. 336, 151 N. W. 813; Foot v. Great Northern R. Co., 81 Minn. 493, 84 N. W. 342, 52 L. R. A. 354; 14 C. J. 538. As the subscription was a joint subscription and the stock was held in trust for the subscribers jointly, the liability for stock assessment was also joint, being "contractual and arising from the subscription to the stock." Matteson v. Dent, 176 U. S. 521, 525; Richmond v. Irons, 121 U. S. 27, 55. If the trustee had subscribed for stock for each of the defendants individually, a different situation would be presented, even though one block of stock had been issued to him as trustee; but this is not what happened. He subscribed for the defendants jointly and held the shares of

stock which were issued upon the subscription for their joint use and benefit, to be devoted to a joint purpose and not to be divided among them. Not only was there no subscription for the defendants individually, but none of them could have required the trustee to allot to him his interest of the stock in severalty.

A case very much in point is English v. Gamble (C. C. A. 8th), 26 Fed. (2d) 28. In that case the stock of a national bank had been assessed and, upon failure of some of the stockholders to pay the assessment, the directors put up the deficiency. Afterwards the stock of the defaulting stockholders was sold and was purchased by a trustee for the directors who had made good the deficiency and he thereafter held the stock for their benefit. Subsequently the bank failed and a stock assessment was levied against the directors jointly for the amount of the stock held in trust for them by the trustee. In holding the directors liable for the assessment, the Circuit Court of Appeals of the Eighth Circuit said: "Shorn of all technicalities, clearly this made the defendants the joint owners of this particular stock which was still held by them in the name of the trustee at the time the bank closed its doors. As such joint owners they became jointly and severally liable for the subsequent assessment."

There was no error and the judgment appealed from will be affirmed.

Affirmed.

[fol. 79] In United States Circuit Court of Appeals, Fourth Circuit

No. 3970

L. P. Chisholm, Waller Holladay, W. Earl Crank, T. S. Winston and W. R. Dunkum, Appellants,

vs.

W. B. Gilmer, Receiver for the First National Bank of Louisa, Louisa, Virginia, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia

Judgment—Filed and Entered January 7, 1936

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge.

January 7th, 1936.

[fol. 80] In United States Circuit Court of Appeals

Order Staying Mandate—Filed January 25, 1936

Upon the application of the Appellants, by their counsel, M. J. Fulton and H. W. Walsh, and for good cause shown, it is

Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Appellants in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 40 days from this date.

John J. Parker, Senior Circuit Judge.

January 25, 1936.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] Supreme Court of the United States

Order Allowing Certiorari—Filed April 13, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the question of the jurisdiction of the District Court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,382. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 828. L. P. Chisholm, Waller Holladay, W. Earl Crank et al., petitioners, vs. W. B. Gilmer, Receiver for The First National Bank of Louisa, Louisa, Virginia. Petition for a writ of certiorari and exhibit thereto. Filed March 14, 1936. Term No. 828, O. T., 1935.